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NO._____

SUPREME COURT OF THE UNITED STATES

TERM, 198

Supreme Court, U.S.
FILED
JAN 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

JULIUS TAYLOR,
Petitioner,

vs.

MARGARET M.HECKLER, Secretary of Health and Human Services,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

Charles J.Casale,Jr.,
Counsel for Petitioner,
311 WhiteHorse Ave.
Mercerville,N.J.08610
Phone (609) 585-7711

Albert B.Kahn, Jr.,
Co-Counsel for Petitioner,
685 Parkway Ave.
Trenton,N.J.08628-0794
Phone (609) 771-0303

QUESTIONS PRESENTED

1. Where Petitioner has non-exertional impairments, it is the law throughout nearly all the Federal Circuit Courts of Appeal that the Secretary must make a specific finding that despite his non-exertional impairments, Petitioner could still perform a full range of light and sedentary work on a sustained basis, said finding to include the testimony of a vocational expert as to the specific jobs that can be performed by Petitioner, and therefore the medical-vocational guidelines cannot be mechanically applied where there are non-exertional impairments; such a finding was not made in the instant case but rather, the medical-vocational guidelines were mechanically applied for a finding of no disability, and therefore this case should be remanded to the Secretary so that such a finding, including vocational expert testimony, can be obtained.

2. The Secretary has failed to consider the cumulative effects of petitioner's multiple impairments, thereby rendering the prior judicial decision in this case void.

3. Since the Secretary failed to consider subjective evidence of pain, the decision of the Third Circuit should be reversed.

4. The opinion of petitioner's examining physician concluding petitioner to be disabled is entitled to a great deal of weight in the absence of substantial evidence to the contrary, particularly where the Secretary's only medical opinion is by a non-examining, non-treating doctor, and therefore the Secretary's failure to give the proper weight to petitioner's doctor's opinion is grounds for reversal.

5. In determining whether petitioner's impairments are the equivalent of any listed impairments under 20 C.F.R. Part 404 Subpart P, Appendix 1 (hereinafter referred to as Ap. 1),the Secretary should obtain a medical opinion on the question of medical equivalence, and since this was not done in this case, the decision of the Third Circuit should be reversed.

6. Petitioner has no academic skills to perform sedentary work since he flunked the G.E.D. test two times, and therefore, the Secretary's application of the medical-vocational guidelines to petitioner's residual functional capacity was erroneous.

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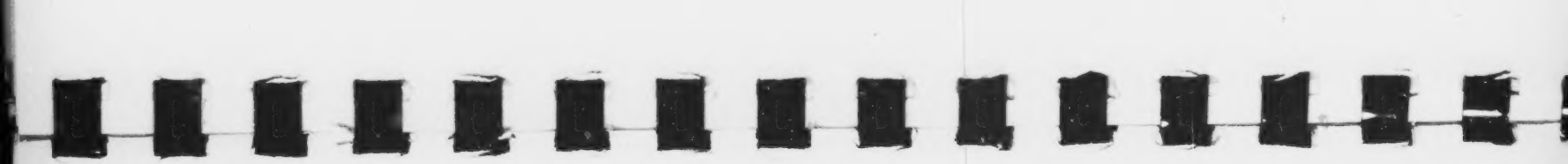

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IN THE

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JULIUS TAYLOR,
Petitioner,

vs.

MARGARET M.HECKLER, Secretary of Health and Human Services,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT.

Petitioner, Julius Taylor, prays that a writ of certiorari issue to review the judgment of the United States court of Appeals for the Third Circuit entered March 5,1986 affirming the judgment dated May 30,1985 of the Honorable Clarkson S.Fisher, Judge of the United States District Court for the District of New Jersey, which affirmed the final decision

of the Secretary of Health and Human Services, Respondent, denying Julius Taylor, Petitioner, disability benefits, and that on hearing, the judgment of affirmance be reversed.

OPINIONS BELOW

The opinion of the Court of Appeals (App.1) is not yet reported.

The opinion of the District Court dated May 30,1985 affirming the final decision of Respondent denying Petitioner disability benefits (App.2) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 5,1986. Timely Petition for Rehearing in Banc was filed, and was denied on April 9, 1986. This Court has jurisdiction under 28 U.S.C.A. § 1254(1).

STATEMENT OF THE CASE

Petitioner filed an application under Title II of the Social Security Act for disability insurance benefits on April 20,1976. Petitioner, born May 20,1945, alleges disability since January 1975 due to narcolepsy and cataplexy and left leg surgery resulting in arthritis of the left knee. (Tr.p.78, 86, 87, 88, 89.) He met the special earnings requirement in January,1975 and continued to meet them until March 31,1979.

Petitioner was hospitalized at Mercy-Douglas Hospital from November 7,1966 to November 30,1966 and was diagnosed as having Idiopathic Hypercalcemia and narcolepsy with cataplexy by Dr.Edward S. Cooper. (Tr.p.114-118.) Patient complained of attacks of drowsiness for the past seven years. (Tr.p.114.) The attacks of drowsiness occurred at any time and during these periods of drowsiness, the

patient's speech would be slowed, his head would drop and there is a brief loss of awareness. (Tr.p.114.) The results of the EEG were grossly abnormal. (Tr.p.116.) There are bursts of slow wages, Beta, 6 per second, arising out of bilateral anterior temporal fossa, developing first into high voltage Delta waves in the same leads and then spreading to all leads in frank seizure activity. (Ir.p.116.) There are occasional spike and spiking wave formations. (Tr.p.116.) Dexedrine was prescribed.

Petitioner was admitted to Cooper Hospital on June 29,1975 for chronic subluxing left patells or dislocation of the left patella and underwent a Hauser procedure with Advancement Vasties Medialis for removal of bony bodies as well as to correct dislocation of the knee. Petitioner was discharged on July 5,1975. (Tr.p.132-142.)

An X-ray prior to the operation revealed evidence of degenerative spurring involving the distal femoral condyles,patella and fibia.)Tr.p.137.) Therefore,petitioner had osteoarthritis as early as June 29,1975, a condition that was never corrected and that continued to disable petitioner to the present date.

The Secretary obtained the opinion of a non-examining consultant, Dr.Michael W.Dennis, dated December 3,1976, who stated that individuals with narcolepsy with appropriate medication and appropriate stimulating environment, are generally not impaired in terms of work activity and this would certainly appear true in claimant's case. (Tr.9.)

On July 29,1976, Dr.Chaudry found that petitioner has narcolepsy and should be continued on retalin. (Tr.p.185.)

Dr.Chaudry performed an EEG on petitioner on October 25,1977 and the results

were that petitioner appears to have narcolepsy, which could be due to a lesion in the alerting mechanisum and recommended continued use of retalin. (Tr.p.191.)

On December 11,1979, Dr. Williams diagnosed petitioner as having narcolepsy. (Tr.p.481.) In March,1981,Dr.Chaudry diagnosed petitioner as having narcolepsy and cataplexy. (Tr.p.537).

Dr.Arthur Randelman performed an EEG on March 26,1981 on petitioner and found that the results were consistent with narcolepsy. (Tr.p.545.) On April 3,1981 and April 6, 1981 Dr. Chaudry concludes that petitioner has narcolepsy and prescribed retalin.(Tr. p.547-8.)

On September 15,1975 at the prison,Dr. Field found that petitioner had crepitation of the patella and diagnosed him as having crepitation and arthritis of patella. Tr. p.172). Dr.Bernard Schnur,a radiologist, found in his November 9,1977 X-ray, mild

osteoarthritis with old post-traumatic residual and old operative residual. (Tr. p.407). On October 24,1977, Dr.Field noted that X-rays on October 21,1977 show early arthritis of the knee joint.(Tr.p.406.)

On May 31, 1979, Dr.Field noted that X-rays today reveal that the arthritis of the left knee joint has not changed to any significant extent. (Tr.p.434.) On August 24,1981, Dr.Field found that left knee flexion restricted to about 90° and that old X-rays of left knee showed osteoarthritis present. (Tr.p.564.)

On July 21,1982, petitioner was referred to Dr.Thomas T.Capatosta,Jr.with pain in the left knee to see if he actually needed the cane he uses, and was diagnosed as having severe pan arthritis of the left knee joint not only in the patellofemoral joint, but also in the medial and lateral tibiafemoral joints requiring a cane or crutch. (Tr.p.614.) Dr. Capatosta concluded that petitioner's pain and need for a crutch was real and that he

should be allowed to use the cane or crutch for the remaining time of his prison stay. (Tr.p.614.) Dr.Capatosta stated further that petitioner may realistically come to a total knee replacement, but this would be done only if the pain became so severe that the petitioner could not stand it. (Tr.p.614.)

The application for social security disability benefits was initially denied on June 14,1977 and again on reconsideration on September 17,1977 by the Social Security Administration. Petitioner requested a hearing which was held de novo on May 18, 1978 before the Administrative Law Judge Irwin N.Hackerman. By way of hearing decision dated August 1,1978, the Administrative Law Judge determined that petitioner was not under a disability. Petitioner requested review of the hearing decision on September 5,1978 and the hearing decision was upheld by action of the Appeals

Council dated September 28,1978.

At the Administrative hearing, Dr.Conrad E.Bell, an osteopath, testified that petitioner is being treated for narcolepsy and for an osteoarthritic condition of the left knee and for a duodenal ulcer. (Tr.p.64.) Dr.Bell further testified that the symptoms of narcolepsy are that petitioner was going to fall asleep without any warning and at inopportune times and there is no pattern to it. (Tr.p.64.) He further stated that petitioner is being treated by the usual therapy as recommended by a neurologist of taking Dexedrine on a regular basis so that he could function and he is on medication for the arthritis, aspirin, cortisone, derivitives and something with codeine. (Tr.p.64.) Dr.Bell testified that petitioner is more likely to fall asleep due to narcolepsy when the body state is such that he is in a relaxed condition, lying down, sitting down. (Tr.p.66.) He further stated at the hearing that peti-

tioner was in an incongruous situation where he can't really walk because of his leg and his crutches or be very active and then if he's not very active he's being adversely affected by the narcolepsy situation. (Tr.p.66-7.) Dr.Bell testified that petitioner was being treated for osteoarthritis of the left knee, and that this means that to to a certain extent the leg is immobile, that he's lost some of the use of his leg and that the combination of arthritis and surgery on the knee is definitely going to give some loss of function of that appendate. (Tr.p.65.) Dr.Bell further testified that the exact amount of disability should be determined by an orthopedist rather than himself. (Tr.p.65.) Dr.Bell stated at the hearing that any arthritis is going to have pain periodically.

He further testified that cool, damp weather will always cause some discomfort, either in the form of stiffness and/or pain

and that the problem with his knee is going to curtail his ability to ambulate.(Tr.p. 67-8.)

Petitioner testified at the Administrative hearing that he did not perform any duties while in prison, that in taking courses for his high school equivalency test (GED) he fell asleep during the tests and it took him an extra long time to finish the tests, that he flunked the GED test the first two times he took it, that he flunked out of college due to his carcoleptic attacks since he could not stay awake in class, that if he does something exceptional or stimulating he can manage, but anything under that he will fall asleep, that when he undergoes a seizure he can see you but cannot talk and cannot tell you what is wrong with him, and that when he undergoes a seizure he has no control over it, has trouble speaking and his hands drop. (Tr.p. 49-61.) Petitioner further testified that

his prior work was that he was a carpenter. (Tr.p.69-70. Petitioner stated at the Administrative hearing that he had narcolepsy ever since he was sixteen (16), that it affected him when he was doing construction work and was on pyramid walls and would doze off and fall asleep and this is when it became dangerous for him and the foreman told him to go to the hospital. (Tr.p.71-2.) Thereupon, petitioner was admitted into the hospital in 1966 and was diagnosed by Dr.Cooper as having carcolepsy with cataplexy. (Tr.p.72,p.114-118.) While in vocational school,petitioner testified he went to sleep in most of his classes and ended up flunking these courses. (Tr.p.72-3.) He also fell asleep practically every day in classes toward his GED. (Tr.p.73.)

On December 14,1978, petitioner filed a Complaint in the United States District Court, District of New Jersey,

appealing the decision of the Secretary under 42 U.S.C.A. §405 (g), giving the District Court jurisdiction. On June 5,1979 the United States District Court dismissed petitioner's Complaint. On June 13,1979, petitioner made a Motion for Reconsideration and the Complaint was reinstated on September 5,1979.

The Appeals Council reopened petitioner's case on December 17,1979 when it was remanded by the United States District Court, District of New Jersey, because of missing documents at the time of its September 28, 1978 decision. The Appeals Council vacated its September 28,1978 decision and on February 28,1980 found that petitioner was not under a disability.

Petitioner appearing pro se appealed the decision of the Appeals Council to the United States District Court, District of New Jersey. On March 30,1981, the Secretary's Motion for Summary Judgment was granted by

Honorable Clarkson S. Fisher. On June 1, 1981, petitioner, represented by counsel, filed a Notice of Motion for Reconsideration of Judgment and Remand to Secretary in the United States District Court, District of New Jersey. On August 4,1981, the United States District Court vacated its judgment of March 30,1981 and remanded the matter to the Secretary for the consideration of additional evidence. On March 17,1982 petitioner filed a Motion to compel Secretary to Comply with Court's Order of August 4,1981. On March 30,1982, the Appeals Council vacated its decision of February 28,1980, vacated the decision of the Administrative Law Judge dated August 1,1978 and remanded the case to an Administrative Law Judge.

On July 7,1981, Dr.John W.Vester, a neurologist, executed an affidavit stating that he reviewed petitioner's social security record and in his professional opinion, there are good indications in the tran-

script that petitioner could be disabled within the meaning of the Social Security Act. (Tr.266-7.) Dr.Vester stated in his affidavit that the more physically active a narcoleptic is, the less likely he is to have sleep attacks and that petitioner appears to be limited in his physical activity by his recurrent patella subluxation. (Tr.p.267.) Dr.Vester further stated that sedentary work, no matter how stimulating, is conducive to bringing on uncontrollable sleep spells in a narcoleptic and that petitioner would be unable to perform a job involving desk work, reading, etc. (Tr.p.268.) Dr.Vester further stated that an individual with a severe case of narcolepsy could easily be disabled, particularly if he is unable to do any physical work. (Tr.p.268.) Dr.Vester concludes that in order to delineate the exact nature of petitioner's narcolepsy, its severity, its deterioration, the effect of medication on it,

he would recommend that a somnogram be taken over a period of twenty-four hours at sleep center such as in Hershey,Pennsylvania or at the University of Pennsylvania. (Tr.p.268-9.)

On July 9,1981, Dr.Erich H.W.Simon, a neurologist, executed an affidavit stating that he reviewed the Social Security record of petitioner and found that petitioner has the disease of narcolepsy with cataplexy. (Tr.p.270-1.) Dr.Simon further stated that in his professional opinion, petitioner could be disabled within the meaning of the Social Security Act.(Tr.p. 271.)Dr.Simon further stated that petitioner has been taking such medication as retalin and dexedrine, but the effect of this medication in controlling his attacks of sleep paralysis is unclear and undocumented. Dr.Simon further stated that an individual such as petitioner could easily be disabled from a

severe case of narcolepsy with cataplexy. (Tr.p.272.) Dr.Simon stated that in order to make a final statement that petitioner is disabled, it is necessary to conduct comprehensive examinations, tests and observations and favored he undergo appropriate studies such as special EEG testing over a period of twenty-four (24) hours (all night polysomnogram) as best provided at one of the medical schools with the necessary set-up of a sleep-wake disorder unit, preferable at the Montefiore Hospital Medical Center. (Tr.p.272.)

Robert Slaughter executed an affidavit dated April 13,1982, stating that he lived in the same wing at the prison as did petitioner and used to see him several times a day and that during a thirty minute conversation with him, petitioner would fall asleep two or three times without warning. (Tr.p.248.) Mr.Slaughter further observed petitioner several

times standing in his cell and then suddenly collapse onto his bed, with his body being totally limp and maintaining an awareness but could not talk.(Tr.p.249.) Medication received in the prison did not appear to have any effect on petitioner's sleeping disease. (Tr.p.250.)

Larry Williams executed an affidavit dated May 3,1982 in which he stated that he knew petitioner for over twenty years and observed him fall asleep during conversations and knew that these sleep attacks had nothing to do with his being tired. (Tr.p.252.) Sometimes petitioner would wake up and enter into the conversation as if he had heard what was being said and other times he would have no idea of what had been said.(Tr.p.252-3.) On many occasions he observed petitioner fall asleep while he drove his car,while playing chess and while standing up. Tr.p.253.)

Cornelius Boone executed an affidavit dated November 3 ,1982,and stated that he knew petitioner in prison for approximately six years and had observed him suddenly fall asleep during a conversation with him during which he would nod his head,nearly fall onto the floor and suddenly straighten up just before hitting the floor. (Tr.p.256-7.) Mr.Boone observed petitioner fall asleep while he was walking and on several occasions saw him fall to the floor. (Tr.p.257.) Mr.Boone stated that petitioner is confined to his cell because he is considered to be disabled by the prison authorities and incapable of doing any work. (Tr.p.258.) Mr.Boone further stated that petitioner cannot walk without the aid of a cane or crutches and was given a wheel chair because he could not walk. (Tr.258.) Mr.Boone observed that petitioner's condition regarding his narcolepsy and his inability to

walk has only gotten worse since he knew petitioner and, therefore, he does not think petitioner will ever be able to work at any job either in the prison or on the outside. (Tr.p.258.)

Pursuant to an order of the Administrative Law Judge, Dr. Michael J.Thorpy, neurologist, performed an examination and tests on October 5,1982 and October 6, 1982 at the Sleep-Wake Disorder Center,Department of Neurology, Montefiore Medical Center and Albert Einstein College of Medicine, 110 East 210th Street, Bronx, New York, 10467.

Dr. Thorpy performed an overnight polysomnogram and a multiple sleep latency test.

Dr. Thorpy diagnosed petitioner as having narcolepsy and cataplexy (Tr.p.263) and concluded that:

> "The patient is severely disabled by the Narcolepsy and Cataplexy. In addition, he has orthopedic problems with his knees which are contributing to his disability.

"He is unable,at the present time, to do any type of gainful employment. The medications may improve his functional capacity but the underlying condition cannot be reversed and is a lifetime disorder."
(emphasis supplied) (Tr.p.263.)

In reply to a letter from the Honorable Irwin N.Hackerman, Administrative Law Judge, Dr.Thorpy wrote a letter to Judge Hackerman, dated November 16,1982, in which Dr. Thorpy stated that:

"the clinical impression of Narcolepsy plus a positive Multiple Sleep Latency test confirms the diagnosis of Narcolepsy which, in my opinion, is indisputable.

"It is not possible to predict to what extent his symptoms will be relieved by medications other than to say that it is virtually impossible to return him to a normal functioning level by the use of any medications. The normal mean onset to sleep is greater than 10 minutes. Mr.Taylor has a mean onset to sleep of 1.1 minutes. Patients with Narcolepsy usually have a mean onset to sleep of less than 5 minutes. Therefore Mr. Taylor is severely sleepy and any improvement by medications can only be subjective unless this form of testing is repeated."
(emphasis supplied) (Tr.p.264.)

Dr.Thorpy further stated in a letter

to Albert B.Kahn,Jr., Esq. dated December 2,1982, that:

> "The most common age for narcolepsy to be present is in the second decade. From Mr. Taylor's description to me, plus evaluation of his records, I have no doubt that his narcolepsy began after the age of 14 years, approximately in 1959. This is based upon his own testimony and the report of Dr.Edward S.Cooper which was done in 1966. Narcolepsy, even when treated, is a disabling condition, and I have no doubt that he has been totally disabled from at least 1966, again, according to the medical report at that time. Narcolepsy is a major cause of impaired education and there is no doubt that the narcolepsy contributed to Mr. Taylor's poor academic achievements." (emphasis supplied) (Tr.p.301.)

On December 7,1982, the Administrative Law Judge issued his Recommended Decision, without conducting a hearing, finding that petitioner was disabled due to severe narcolepsy since date of onset in January, 1975, and has continued uninterrupted through the date of this decision, based on the current record including the newly received evidence that sequential

evaluation reveals that petitioner has had a severe impairment within the meaning of the Act since at least January, 1974 and that since such time, petitioner has been unable to perform his prior work activity and has been unable to engage in any other relevant work activity, that petitioner was confined in a penal institution for the conviction of a felony, was not engaged in a court-approved rehabilitation program during that period and is not entitled to disability benefits during that period under 42 U.S.C. § 423 (f)(1); that after November 15,1982, date of his release from prison, petitioner is entitled to receipt of disability benefits; and that any subsidiary beneficiary is entitled to benefits during the period of petitioner's confinement. (Tr.p.216-223.)

The February 13,1984 decision of the Appeals Council was as follows:

The Appeals Council does not adopt the recommended decision. It is the decision of the Appeals Council that, based on his application filed on April 20, 1976, the petitioner was not under a disability and entitled to disability insurance benefits under the provisions of sections 216(i) and 223, respectively, of the Social Security Act, as amended, on or prior to March 31,1979. (Tr.p.215.)

On April 16, 1984, petitioner appealed the February 13,1984 decision of the Appeals Council by filing Notice of Motion to Reopen This Matter for Review by this Court of Decision dated February 13,1984 of Appeals Council of Department of Health and Human Services, Social Security Administration, in the United States District Court, District of New Jersey, Civil Action #78-2997.

On April 27,1984, the Honorable Clarkson S.Fisher, Chief Judge, United

States District Court, District of New Jersey, issued Order Reopening This Matter for Review by this Court of Decision dated February 13,1984 of Appeals Council of Department of Health and Human Services, Social Security Administration.

On May 30, 1985, Judge Fisher issued an Order stating that the final decision of the Secretary denying petitioner disability benefits is supported by substantial evidence and is affirmed.

On June 27, 1985, petitioner filed Notice of Appeal with the United States Court of Appeals for the Third Circuit.

On March 5,1986, the United States Court of Appeals for the Third Circuit issued its Judgment Order adjudging and ordering that the Judgment of the District Court be affirmed.

On March 19,1986, petitioner filed Petition for Rehearing in Banc and for Panel Rehearing with the United States

Court of Appeals for the Third Circuit.

On April 9,1986, the United States Court of Appeals for the Third Circuit issued its Order denying said Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

1. The Third Circuit Court of Appeals has made a decision in the instant case in conflict with its own decisions and with numerous previous decisions of other federal courts of appeal and therefore should be reversed and remanded to the Secretary of Health and Human Services for the reasons that follow.

The Secretary promulgated medical-vocational guidelines in 1978 to assist in the determination of Social Security disability claims. See 20 C.F.R. §404, Subpart P, Appendix 2 (1983). (hereinafter cited App.2). These guidelines termed "the grids", consider a claimant's residual functional capacity - the functional level of work that he is physically able to perform on a sustained basis - in relation to his age, education and work experience and work experience and then set forth

corresponding rules that identify whether there exist a significant number of jobs in the national economy that the claimant can perform. Channel v. Heckler, 747 F.2d 577 (10th Cir.1984). Where the claimant's characteristics coincide with the criteria of a specific rule in the grids, that rule directs a conclusion as to whether the claimant is disabled. Id.

This Court examined the medical-vocational guidelines and concluded that the Secretary could rely on them in appropriate circumstances to determine disability claims but that the grids are applicable only when they describe a claimant's abilities and limitations accurately. Heckler v.Campbell,461 U.S. 458, 103 S.Ct. 1952, 76 L.Ed.2d 66 (1983) Channel v.Heckler, supra. Claimants may possess limitations not factored into the guidelines, in which case the individual's particular limitations must be considered. Heckler v.Campbell, supra, Channel v.Heckler, supra.

The grids consider only impairments that result in exertional or strength limitations and where other non-exertional impairments are present, the grids should not be applied mechanically by the Secretary or an Administrative Law Judge. Channel v.Heckler, supra; Fields v.Harris, 498 F.Supp.478 (Dis.Ga. 1980).

Where the Secretary failed to consider claimant's non-exertional impairments in applying the grids in reaching a decision that the claimant was not disabled under the Social Security Act, the case should be remanded to the Secretary in order to obtain the opinion of a vocational expert as to claimant's capacity to perform specific jobs in the national economy because the range of jobs available to claimant is narrower than the grids would indicate. Smith v.Schweiker,719 F.2d 723 (4th Cir. 1983), Torres v. Secretary of Health and

Human Services, 677 F.2d 167 (1st Cir. 1982), Santese v.Schweiker, 676 F.2d 925, (3d Cir.1982).

Where there are exertional and non-exertional impairments of a claimant, the Secretary, in addition to applying the grids to claimant's specific situation, must make a specific finding that despite claimant's non-exertional impairments, claimant can perform a full range of work determined by the grids and in the absence of such a finding, the case must be remanded to the Secretary for the gathering of additional evidence, including expert vocational testimony. Channel v. Heckler, supra; Carpenter v.Heckler, 733 F.2d 591 (8th Cir.1984); Marshall v. Heckler, 731 F.2d 555 (8th Cir.1984); Nicks v.Schweiker, 696 F.2d 633 (8th Cir. 1983); Jelinek v.Heckler, 764 F.2d 507 (8th Cir.1985); Clark v.Heckler, 733 F.2d 65 (8th Cir.1984); Smith v.Schweiker 728 F.2d 1158 (8th Cir.1984); Smith v. Schweiker, 719 F.2d 723 (4th Cir.1984);

Burnam v.Schweiker, 682 F.2d 456 (3d Cir. 1982); Grant v.Schweiker, 699 F.2d 189 (4th Cir.1983); Gagnon v.Secretary of Health and Human Services, 666 F.2d 662, (1st Cir.1981); Allen v.Secretary of Health and Human Services, 726 F.2d 1470 (9th Cir.1984); Haynes v.Heckler,716 F.2d 483 (8th Cir.1983); McClain v.Schweiker, 715 F.2d 866 (4th Cir.1983).

The Third Circuit Court of Appeals held that Administrative Law Judge erred in treating claimant's exertional and non-exertional impairments separately and in then determining on the basis of the medical-vocational grid, that substantial gainful work existed in the national economy that claimant could perform and Administrative Law Judge instead should have considered whether work existed for person with combination of impairments claimant possessed. Burnam v.Schweiker, supra. The Administrative Law Judge chose

to disregard the non-exertional limitations on the ground that, standing alone, they would not be sufficient to find that claimant was disabled, leading to a remand by the Third Circuit for further proceedings. Id. The medical-vocational grids do not purport to establish the existence of jobs for persons who are afflicted with both exertional and non-exertional impairments. Id.

The Residual Functional Capacity categories in the grids are based on the physical exertion requirements of work in the national economy. See 20 C.F.R. § 404.1567. There are some non-exertional impairments which do not limit physical exertion such as skin impairments, epilepsy, and impairments of vision, hearing or other senses, postural and manipulative limitations, and environmental restrictions. See 20 C.F.R. § 404.1545(d). Other non-exertional impairments including mental impairments of ability to understand,

to carry out and remember instructions and to respond appropriately to supervision, co-workers and work pressures in work setting. See 20 C.F.R. § 404.1545 (c). Dizziness and pain are also non-exertional impairments. Carpenter v.Heckler, supra, Marshall v.Heckler, supra.

The report accompanying the regulations is as follows:

> "Where a person has non-exertional limitations, the ranges of work he or she can perform (sedentary to very heavy) are diminished by exclusion of the particular occupations or kinds of work within those ranges that entail use of the abilities which the person has lost. In some cases, the exclusion will have a negligible effect, still leaving a wide range of work capability within the functional level; while in others the range of possible work may become so narrowed that the claimant does not have a meaningful employment opportunity." 43 Fed.Reg.at 55,358.

When there are exertional and non-exertional impairments, the procedure is as follows in the regulations:

> "Where individual has an ~~an/impairment~~ or combination of impairments resulting in both strength limitations and non-exertional limitations, the rules in the subpart are considered in determining first whether a finding of disabled may be possible based on strength

limitations alone and if not, the rules reflecting the individual's maximum residual strength capabilities, age, education, and work experience provide a framework for consideration of how much the individual's work capability is further diminished in terms of any types of jobs that would be contra-indicated by the non-exertional limitations."
App. 2 § 200.00 (e) (2)

In the instant case, the Secretary did not follow the prevalent case law cited above nor its regulations and therefore this Court should grant this Writ of Certiorari.

The Appeals Council admits that Petitioner had a non-exertional impairment caused by his narcolepsy and cataplexy but states that "claimant's remaining capacity for work activity would not have been significantly affected." (Tr.p.213). The Appeals Council further states that

"where exertional and non-exertional impairments exist, the 'framework' of the Appendix 2 - Medical Vocational Guidelines' to Regulation #4, Subpart P is applicable. The Introduction to the 'Guidelines' notes that when no specific rule

found in the tables applies, the rule still provides guidance for decision making in instances where there is a combination of exertional and non-exertional medical conditions."
20 C.F.R. § 200 (d).(Tr. p.214)

The Secretary then proceeds to find petitioner not disabled by mechanically applying the grids - Rules 201.28 and 201.29 of Table No.1 and Rules 202.28 and 202.29 of Table No.2 of Appendix 2. 20 C.F.R. § 201, 20 C.F.R. § 201, 20 C.F.R. § 202. It should be noted that the Appeals Council erred in citing Rules 202.28 and 202.29 of Table No.2 of Appendix 2 since no such rules exist. This is another reason for this Court to grant Certiorari.

While the Secretary is right that where there are exertional and non-exertional impairments, the grids can still be applied, in the instant case, the grids cannot be applied where the non-exertional impairments are as serious as they are here. The Secretary

did not make an adequate finding that despite claimant's non-exertional impairments, claimant can perform a full range of light and sedentary work. (Tr.213-14). Channel v.Heckler, supra; Carpenter v. Heckler, supra; Marshall v.Heckler, supra; Nicks v.Schweiker, supra; Jelinek v. Heckler, supra; Clark v.Heckler, supra; Smith v.Schweiker, 728 F.2d 1158 (8th Cir. 1984; Smith v.Schweiker, 719 F.2d 723 (4th Cir.1984); Burnam v.Schweiker, supra; Grant v.Schweiker, supra; Gagnon v.Secretary of Health and Human Services; supra; Allen v.Secretary of Health and Human Services, supra; Haynes v.Heckler, supra; McClain v.Schweiker, supra.

Petitioner's non-exertional impairments are very serious and impact greatly on the range of sedentary and light work that he is capable of doing. Therefore, the grids should not have been applied mechanically by the Secretary in the absence of any real evidence as to what

jobs petitioner can do with his exertional and non-exertional impairments. Therefore, the case should be remanded for further gathering of evidence and specifically for the testimony of a vocational expert.

The record is replete with evidence of the seriousness of petitioner's non-exertional impairments and their effect on his residual functional capacity.

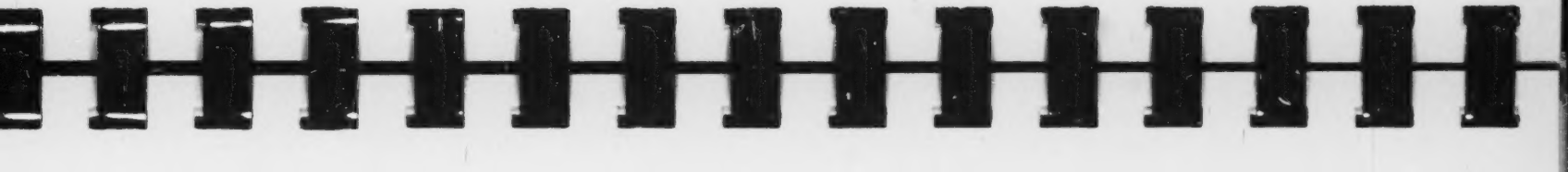
The Administrative Law Judge, in his Recommended Decision dated December 7, 1982, without conducting a hearing, found that petitioner was disabled due to severe narcolepsy since date of onset in January,1978, and has continued uninterrupted through the date of this decision.(Tr.216-223).

Dr. Thorpy, in his report, based on extensive clinical testing, including, but not limited to, an overnight polysomnogram and a multiple sleep latency test, concluded that petitioner is severely disabled by the narcolepsy and

cataplexy, that his orthopedic problems with his knees contribute to his disability, and that at the present time is unable to do any type of gainful employment. (Tr.p. 259-263 (emphasis supplied). Therefore the above findings of the Secretary directly contradict Dr.Thorpy's report, Dr.Thorpy being an expert in the area of narcolepsy and cataplexy who performed tests solely for the purpose of diagnosing whether or not petitioner had narcolepsy and cataplexy

and whether or not he was disabled from these impairments.

Dr. Thorpy further concluded that narcolepsy, even when treated, is a disabling condition, that it would be virtually impossible to return petitioner to a normal functioning level by the use of any medications and that petitioner has been disabled at least since 1966 based on the medical report of Dr.Edward



S. Cooper. (Tr.p.301, 264, 114-118.)

Petitioner's prior medical history is full of diagnoses of narcolepsy and cataplexy. (Tr.p.114-116, 184, 191, 544, 545, 548.) Based on the prior medical history of narcolepsy and cataplexy, based on petitioner's own testimony at the administration hearing, and based on his own tests, Dr.Thorpy concluded that petitioner has had narcolepsy since he was 14 years old in 1959 and has been totally disabled at least since 1966. (Tr.p.301.)

Clearly, petitioner's narcolepsy and cataplexy prevent him from doing any type of gainful employment, including sedentary or light work. (Tr.p.263, 301, 266-272.) Petitioner testified at the hearing before the Administrative Law Judge that he can fall asleep at any time due to his impairment, whether it is during an examination taken in a

college level course, sitting in a lecture, standing up, doing construction work, or other types of physical activity. (Tr.55-62, 71-73.) Petitioner, while working as a carpenter, used to fall asleep high up on a building:

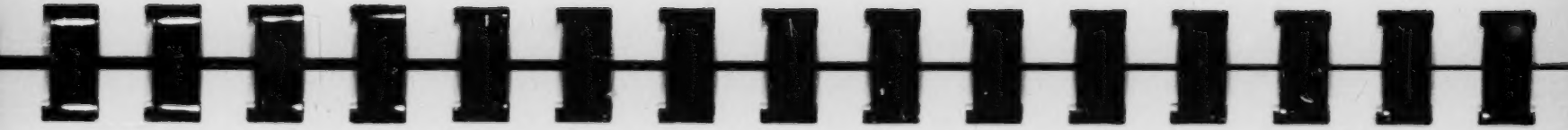
> "When I was doing construction work and it was on pyramid walls and stuff like that, where I was dozing off and falling asleep, and this is when it became dangerous to me and the foreman's had me to go, told me to go to the hospital about it 'cause they was worried about it, you know, and they said they would have to do something about it."
> (Tr.p.57, 72-73.)

If petitioner does any job where he is sitting down or attends college classes,he has sleep attacks and is unable to function. (Tr.p.57,72-73.) Neurologists, Dr. Erich Simon and Dr.John Vester both stated that petitioner's sleep paralysis could occur to him at any time, whether he is working on a construction job, (Tr.p.72), standing waiting for a

bus (Tr.p.58), sitting in a high school or college class (Tr.57,72,192), taking a scholastic test (Tr.p.55) or sitting in his cell. (Tr.p.60,p.266-272) Both neurologists were of the opinion that if petitioner did sedentary work, no matter how stimulating, he would be subject to sudden attacks of sleep paralysis. (Tr.p.268, 271.)

Petitioner did not have a job while he was incarcerated, being considered by the prison authorities to be disabled. (Tr.p.52-3,p.249).

Cornelius Boone, an acquaintance of petitioner, observed petitioner while he was incarcerated and stated that petitioner could fall asleep at any time. (Tr.p.256). Mr. Boone stated that petitioner would suddenly fall asleep in the middle of a conversation. (Tr.p.256-257.) In the course of a 20 minute conversation, petitioner would fall asleep several times



without warning. (Tr.p.257). Mr. Boone also observed petitioner fall asleep at various times while walking on crutches or with a cane. (Tr.p.257). Mr. Boone observed petitioner fall asleep while visiting with family and friends, while studying in the prison law library and while playing checkers or chess.(Tr.p.257). Mr.Boone observed that petitioner's impairments have gotten worse since he knew him in the prison. (Tr.p.258.)

Larry Williams, an acquaintance of petitioner prior to petitioner's incarceration, observed that petitioner would fall asleep during conversations, while driving, while standing up, while playing chess. (Tr.p.252-253.) Mr. Williams concluded that it would be impossible for petitioner to hold a job since he would be constantly falling asleep.(Tr.p.2523-2524.)

Robert Slaughter, an acquaintance of petitioner in prison, observed petitioner

fall asleep during conversations, while sitting, while standing, while reading, while watching television or listening to the radio. (Tr.p.248-249.) He had these sleep attacks at times when normal people would be awake. (Tr.p.249.) Mr.Slaughter also observed petitioner have cataplectic seizures. (Tr.p.249.) Medication did not have any effect on petitioner's sleeping attacks. (Tr.p.250.) Because of petitioner's impairments, he was considered disabled by prison authorities and did not have to work. (Tr.p.250.) Petitioner testified as to his cataplectic seizures.(Tr.p.59-60.)

The Appeals Council found that petitioner's testimony and the affidavits of Robert Slaughter, Cornelius Boone and Larry Williams cannot be accepted as credible. (Tr.p.213.) This Court should consider this testimony and those affidavits and should not permit the Secretary to

dispense with this valuable first hand evidence so it can deny petitioner Social Security benefits.

Therefore, based on the above evidence, petitioner is unable to perform light or sedentary work due to his impairments of narcolepsy and cataplexy and consequently, the Secretary's conclusion of not disabled based on a mechanical application of the grids, is an egregious error contrary to the law in nearly every Federal Circuit Court of Appeals in the country. Channel v.Heckler, supra; Carpenter vs. Heckler, supra; Marshall v.Heckler, supra; Nicks v.Schweiker, supra; Jelinik v.Heckler, supra; Clark v. Heckler, supra; Smith v.Schweiker, 728 F.2d 1158 (8th Cir.1984); Smith vs. Schweiker 719 F.2d 723 (4th Cir.1984); Burnam v. Schweiker, supra; Grant v.Schweiker, supra; Gagnon v.Secretary of Health and Human Services, supra; Allen v.Secretary

of Health and Human Services, supra; Haynes v.Heckler, supra; McClain v. Schweiker, supra.

The Secretary did not make a serious attempt to assess the effect of petitioner's non-exertional impairments on the range of sedentary and light work petitioner may be capable of doing according to the grids. (Tr.213-14.)

Though petitioner worked to December, 1974, he only did so with extreme difficulty, being severely restricted by his condition of narcolepsy. (Tr.71-72.) Petitioner testified at the administrative hearing that his narcolepsy began when he was approximately 16 and became progressively worse. (Tr.71.) It got to the point where he did not know what would happen on the job, being constantly afraid he would fall asleep while on a construction site. (Tr.71-2.) Narcolepsy is a very complex disease which affected peti-

tioner by causing him to fall asleep suddenly or go into a stupor or a seizure. (Tr.259-63.) He therefore never knew what would happen while working as a carpenter on a construction site and often would fall asleep on pyramid walls high up on a building so that he was a danger to himself and other around him. (Tr.71-72.) In fact, petitioner's foreman became so worried about petitioner's condition causing himself (petitioner) and others harm, that the foreman compelled petitioner to go to a hospital for evaluation of his condition on November 7,1966. (Tr.71-2, 113-117.) Petitioner was hospitalized from November 7,1966 to November 30,1966 and was diagnosed by Dr.Edward S.Cooper as having narcolepsy with cataplexy. (Tr.114-117). Therefore,petitioner was having serious problems as early as 1966, due to his narcoleptic and cataplectic

condition, in not only performing his job but in performing it in a manner so as not to injure himself or others.

When petitioner was younger, he still had problems with sudden sleep attacks whenever he sat down but if he was busy and was standing, he was able to function. (Tr.72.)

Therefore, according to petitioner's testimony, his narcoleptic condition worsened to a point where he was endangering himself and others, much less unable to perform his job. (Tr.71-2.) In his testimony, petitioner states how his narcoleptic and cataplectic condition became aggravated and impaired his ability to work and to function more and more. (Tr. 71-2.)

Petitioner further testified how he fell asleep during classes and examinations given in the prison, causing him to flunk the GED examination two times. (Tr.44-46.) Petitioner was suspended

from the Mercer County Community College program given at the Trenton State Prison because he fell asleep in class and flunked his examinations. (Tr.57.) Only if petitioner was doing something extremely stimulating, could he keep awake. (Tr.58-9). He testified that he could fall asleep standing up as well as sitting down. (Tr.58.) Petitioner described a sleep attack in his testimony:

> "I will go into a nod where my head was bent down to hit my chest and it would constantly do this and then it would snap and then it would hurt my neck like it was breaking. And I am ...awoke now, I can see you and I dan't talk, I can't tell you what's wrong with me."
> (Tr.58-9.)

Petitioner testified that the medication he was taking had no effect on the sleep attacks caused by narcolepsy but did have some effect on the cataplectic seizures, "a painful stage" of his illness. (Tr.59.) He testified as to his cataplectic seizures as follows:

"And also from standing, my limbs if I have something in my hand like this, it drops. Everything like all my limbs is like this, boom. I'll be just, like if I was to go into that, like now, my hands'd drop like this and all I can be saying is m-v, m-a-h, I got (Claimant demonstrates slurred speech) that's the best I could do. and I can't tell you what's wrong with me."
(Tr.60).

Petitioner's testimony further corroborates Dr.Thorpy's opinion of disability from narcolepsy and cataplexy when petitioner states that since July 25,1975 he has been classified as handicapped and did nothing but stay in his cell all day. (Tr.52-55.)

In addition, petitioner constantly fell asleep in classes. (Tr.57, 72-3) Dr.Thorpy opined that narcolepsy is a major cause of impaired education and there is no doubt that narcolepsy contributed to petitioner's poor academic achievements. (Tr.301.)

According to Dr. Thorpy, petitioner's condition has become progressively worse,

thereby showing marked deterioration. (Tr.259.)

Petitioner's case should be remanded back to the Secretary since every indication from the record is that petitioner's residual functional capacity was so severely affected by narcolepsy, that he would not do any type of gainful employment.

Conseqnently, the Secretary's finding of no disability based on a mechanical application of the grids is erroneous and against the established case law and therefore, this Court should grant petitioner Certiorari.

In addition to the non-exertional impairments caused by petitioner's narcolepsy and cataplexy, petitioner incurred significant pain as a result of his left knee impairment. (Tr.263,614,65-66.) This pain is an added non-exertional impairment showing that the Secretary's

application of the grids to petitioner to be in error without a serious finding regarding the effect of petitioner's non-exertional impairments on the range of employment petitioner is capable of performing.

Therefore, this Court should grant Certiorari to petitioner.

2. The Secretary must view the individual claimant as a whole; disability claimants are not to be evaluated as having several isolated symptoms. Tingling v. Secretary of Health and Human Services 575 F.Supp.905 (S.D.N.Y.1983); Karp v. Schweiker, 539 F.Supp.217 (N.D.Cal.1982); Colwell v.Gardner, 386 F.2d 56 (6th Cir. 1967). The Administrative Law Judge must consider the possible cumulative effects of petitioner's multiple disabilities and the effect of the combination of peti-

tioner's impairments. Tingling v.Secretary of Health and Human Services, supra; Dillon v.Celebrezze, 345 F.2d 753 (5th Cir. 1965); Talifero v. Califano, 426 F.Supp. 1380 (Dis.Mo.1977); Farley v.Celebrezze, 315 F.2d 704 (3rd Cir.1963); Hicks v. Gardner, 393 F.2d 299 (4th Cir.1968.)

Therefore, the Secretary must consider the cumulative effects of petitioner's narcolepsy, cataplexy and osteoarthritis of the left knee. The Secretary failed to consider the cumulative effects of petitioner's impairments and therefore her decision must be set aside. (Tr.196-215.)

In particular, the Secretary's failure to combine petitioner's exertional and non- exertional impairments in considering the range of jobs petitioner can do is grounds for reversal of the Third Circuit's opinion, and remand to the Secretary. (Tr.213-14.) Burnam v.Schweiker, supra.

The Third Circuit has recognized that

the Secretary's regulations require him to perform the impossible task of adding apples and oranges:

> "The problem of course, is that medical problems are largely incommensurables, the Secretary's regulations require him to perform arguably the impossible (or meaningless) task of adding apples and oranges..."
> Wier ex rel.Wier, 734 F.2d 955, 963 (3rd Cir.1984).

The Secretary has failed miserably in attempting to add petitioner's exertional and non-exertional impairments and therefore the Third Circuit in the instant case should be reversed.

3. Failure to consider seriously subjective evidence of pain as testified to by appellant constituted grounds for reversal. Smith v.Califano, 637 F.2d 968 (3rd Cir.1981) Thorne v.Weinberger, 530 F.2d 580 (4th Cir.1976); Bittel v.Richardson, 441 F.2d 1193 (3rd Cir.1971); Dillon v. Celebrezze, supra; Ber v.Celebrezze, 332 F.2d 293

(2nd Cir.1964); Hodgson v.Celebrezze, 312 F.2d 260 (3rd Cir.1963).

The Administrative Law Judge may not disregard claimant's subjective complaints of pain solely because there exists no objective evidence in support of such complaints. Simonson v.Schweiker, 699 F.2d 426 (8th Cir.1983); Tucker v. Schweiker, 689 F.2d 777 (8th Cir. 1982); Carpenter v.Heckler, supra.

The Secretary concluded that petitioner's testimony and the affidavits of his friends concerning the effects of narcolepsy and cataplexy cannot be accepted as credible and therefore gives them no weight at all in assessing petitioner's residual functional capacity. (Tr.213.)

The Secretary gives no rational basis for this refusal to consider petitioner's testimony and the affidavits of Robert Slaughter, Cornelius Boone and Larry Williams.

Therefore, the decision of the Third

Circuit goes contrary to the decisions of numerous other courts of the Federal Circuit and should be reversed.

The Secretary's failure to consider the subjective evidence of the manifestations of petitioner's non-exertional impairment is grounds for reversal of the opinion of the Third Circuit Court of Appeals.

4. The opinion of physician who has never treated or examined claimant is entitled to little weight and generally cannot serve as substantial evidence supporting finding of non-disability, when record contains detailed contradictory opinions by physicians who have examined or treated claimant. Ceglia v.Schweiker, 566 F.Supp.118 (Dis.N.Y. 1983).

Where the only evidence tending to support a finding that claimant for social security disability benefits

could do light work, i.e. the testimony of the non-examining, non-treating social security medical advisor, was contradicted by direct testimony of claimant and by the medical diagnosis made by examining and treating physicians, a determination by the Secretary that claimant was not disabled, based upon his ability to do light work, was not supported by substantial evidence and claimant was entitled to disability benefits. Millner v.Schweiker, 725 F.2d 243(4th Cir.1984).

A reviewing court accords little weight to the opinion of a reviewing physician if it is contrary to the opinion of the only physician to examine claimant. Warncke v.Harris, 619 F.2d 412,rehearing den,624 F.2d 1098 (5th Cir.1980). The expert opinions of treating physicians as to the existence of a disability are

binding on the fact finder unless contradicted by substantial evidence to the contrary. McLaughlin v.Secretary of Health, Education & Welfare of U.S. 612 F.2d. 701 (2nd Cir.1980).

Yet, in the instant case, respondent gives no weight to the opinion of petitioner's physician, neurologist Dr. Michael Thorpy, who conducted a thorough two day examination of petitioner and recommended treatment for him. (Tr.214,259-63.) Dr.Thorpy found that petitioner is severely disabled by narcolepsy and cataplexy. (Tr.263.) This opinion should have been given a great deal of weight by the Secretary and should have led the Secretary to conclude that petitioner was disabled under the Social Security Act.

The Secretary's consulting physician, neurologist Dr.Michael Dennis, did not examine or treat

petitioner and concluded, in extremely general and vague terms, that individuals with appropriate medication and appropriate stimulating environment, are generally not impaired in terms of work activity. (Tr.9) Dr. Dennis does not specifically relate his opinion to petitioner's particular condition. (Tr.9) The Secretary gave substantial weight to Dr. Dennis' opinion out of proportion to its minimal value as being prepared by a non-examining, non-treating consultant. (Tr.213-14.)

Certainly there is not substantial evidence to overcome Dr. Thorpy's opinion and therefore Dr. Thorpy's opinion that petitioner is disabled is binding on the Secretary. McLaughlin v. Secretary of Health, Education and Welfare of U.S., supra. The only evidence proffered by the Secretary tending to support Dr. Dennis' opinion

is petitioner's absence of complaints to doctors and nurses. (Tr.210-12.)

Clearly, there is not substantial evidence contradicting Dr. Thorpy's opinion and therefore, the Third Circuit's decision should be reversed. In fact, the prison records only confirm petitioner's severe case of narcolepsy and cataplexy that clearly has disabled him. (Tr. 184, 481, 537, 545, 547).Therefore, petitioner is entitled to social security benefits from date of onset in 1975 to the present and into the future.

5. Under the Secretary's sequential evaluation under 20 C.F.R. § 404.1520(d) which states that if an impairment is listed in Appendix 1 or it is determined that the impairment is the equivalent of one of the listed impairments, claimant is considered disabled without consider- age, education and work experience.

Medical findings must be demonstrated by medically acceptable clinical and laboratory diagnostic techniques and on the question of medical equivalence, the record must indicate a medical judgment furnished by one or more physicians designated by the Secretary. 20 C.F.R. §§ 404.1505, 404.1506; Morton v. Califano, 481 F.Supp.908 (E.D.Tenn.1978).

Petitioner's impairments of narcolepsy and cataplexy could be the medical equivalent of a Mental Disorder under Appendix 1, Subsection 12 or a Neurological impairment under Appendix 1,Subsection 11. Petitioner's impairment of arthritis of the left knee could be the listed impairment or the medical equivalent of Arthritis of a Major Weight-bearing Joint under Appendix 1, Subsection 1.03.

Yet the Secretary did not obtain a medical opinion on the issue of medical equivalence and therefore prevented

petitioner from being declared disabled. It claimant's impairment is severe, meets durational requirements of the statute and is listed in Appendix 1 or is determined to be the medical equivalent of a listed impairment, a finding of disability is mandatory without additional inquiry. Jason v.Heckler, 767 F.2d 82 (5th Cir.1985).

Therefore, the decision of the Third Circuit should be reversed and remanded back to the Secretary for a medical opinion as to the medical equivalence of petitioner's impairments to any impairments on the list of impairments in Appendix 1.

6. The Secretary determined that petitioner had a high school education and applied the appropriate Rule under the medical-vocational guidelines. 20 C.F.R. Part 404, Subpart P, Ap.2,

Rules 201.28 and 201.29 of Table No.1 and Rules 202.28 and 202.29 of Table No.2 of Ap. 2.

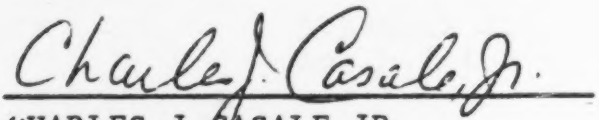
The Secretary's application of the grids led the Secretary to a finding that petitioner was not disabled. (Tr.214-15.)

However, even assuming petitioner's impairments permitted him to do sedentary work, he was a carpenter with no capacity for sedentary work. (Tr.p.69-70). Even though petitioner passed his high school equivalency test in prison, he testified that he fell asleep constantly in class and flunked the C.E.D. test two times before finally passing it. (Tr.55-57, 72-3). He therefore has no skill to perform sedentary work since he did not learn those skills in high school class due to his constant sleep attacks.

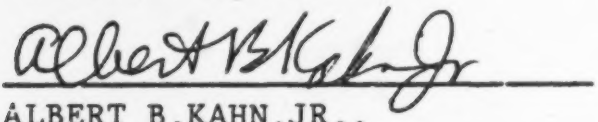
Therefore, the Secretary-s application of the grids to petitioner's

range of employment was erroneous, mandating the reversal of the decision of the Third Circuit.

Respectfully submitted,



CHARLES J.CASALE,JR.,
Counsel for Petitioner,
311 WhiteHorse Ave.
Mercerville, N.J. 08610



ALBERT B.KAHN,JR.,
Co-Counsel for Petitioner,
685 Parkway Ave.,
Trenton,N.J. 08628-0794

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5442

JULIUS TAYLOR,

Appellant

v.

SECRETARY OF HEALTH, Irvin N. HACKERMAN, Marshall C. GARDER

(Civil Action No. 78-2997 - D.N.J. NEWARK)

District Judge: Honorable Clarkson s. Fisher

Submitted Under Third Circuit Rule 12(6)
March 4,1986

BEFORE: ALDISERT, Chief Judge, SEITZ and ADAMS, Circuit Judges

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JUDGMENT ORDER

After consideration of the contentions raised by appellant, and it appearing that the district court correctly determined that the decision of

the Secretary is supported by substantial evidence, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

Seitz

Seitz

ATTEST:

Sally Mrvos

Sally Mrvos, Clerk

Dated: March 5,1986

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-5442

JULIUS TAYLOR,

Appellant

v.

MARGARET M. HECKLER, Secretary of
Health and Human Services,

Appellee

(Civil No. 78-2997-D.N.J. - NEWARK)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, Chief Judge, SEITZ, ADAMS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, and MANSMANN, Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concur-

red in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Circuit Judge

Dated: Apr 9 1986

ENTERED ON THE DOCKET
on 6/4/1985
Allyn Z.Lite,Clerk
By N. Rodriguez
(Deputy Clerk)

Received
May 30, 3:28 pm
85
UNITED STATES
DISTRICT COURT

APPENDIX 3

JULIUS TAYLOR, Plaintiff,	:	UNITED STATES DISTRICT COURT
v.	:	DISTRICT OF NEW JERSEY
MARGARET M.HECKLER, Secretary of Health and Human Services,	:	Civil Action No. 78-2997
Defendant.	:	ORDER

The court having considered the entire administrative record and the briefs submitted, and good cause having been shown, it is, on this 30th day of May, 1985,

ORDERED that the final decision of the Secretary denying plaintiff disability benefits is supported by substantial evidence and is affirmed. No costs.

CLARKSON S. FISHER,
Chief Judge
United States
District Court

FILED
May 30,1985
at 3:28 PM
Allyn Z. Lite

NOT FOR PUBLICATION

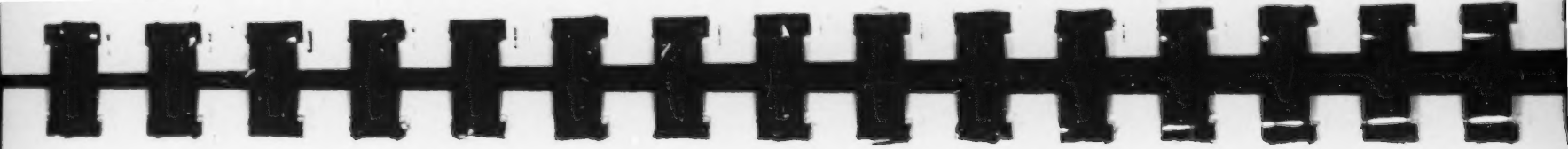
APPENDIX 4

JULIUS TAYLOR, Plaintiff,	:	UNITED STATES DISTRICT COURT
v.	:	DISTRICT OF NEW JERSEY
MARGARET M. HECKLER, Secretary of Health and Human Services, Defendant.	:	Civil Action No. 78-2997
	:	MEMORANDUM

ORIGINAL FILED
May 30, 1985
Allyn Z. Lite,
Clerk

FISHER, Chief Judge.

This is an action brought under section 205(g) of the Social Security Act, as amended (the Act), 42 U.S.C. §405(g), to review a final decision of the Secretary of Health and Human Services denying the application of plaintiff for a period of disability and disability insurance benefits. Plaintiff, Julius Taylor, initially applied for disability benefits on April 20, 1976, claiming an inability since January 1975 to engage in substantial gainful activity by reason of the combined effect of neurological and orthopedic impairment. Specifically,



plaintiff claimed to be impaired by narcolepsy with cataplexy and a severe left-knee injury.

On March 31, 1981, this court issuued an order affirming the decision of the Secretary dated February 28, 1980, which found plaintiff to be not disabled within the meaning of the Act and, therefore, not entitled to disability insurance benefits. Subsequently, by order dated August 4, 1981, this court vacated its earlier order, granted plaintiff's motion for consideration of new medical evidence, and remanded the matter to the Secretary with instructions to arrange for a comprehensive neurological examination of plaintiff.

Thereafter, the Appeals Council by order dated March 30, 1982, remanded the case to an administrative law judge (ALJ). After receiving additional medical evidence, including the results of a comprehensive neurological examination, the

ALJ issued a recommended decision on December 7, 1982, finding plaintiff to have met the special earnings requirements of the Act from January 1975 until March 30, 1979 (Tr. 222).[1] In addition, the ALJ found that

> (c)urrent review of the record indicates that claimant has been disabled, within the meaning of the Act, due to narcolepsy, since date of onset in January 1975, such disability continuing uninterrupted, since onset, up to and through the date of this decision.
>
> Such award of benefits is based on the authority of section 404.1520(f) as claimant has a severe impairment, is not able to do his

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[1] The Appeals Council noted in its opinion that the ALJ found plaintiff to be last insured for disability benefits under title II of the Act on March 31, 1979 (Tr. 198). A review of the record reveals that, although the ALJ initially made no finding with respect to the date after which plaintiff was no longer insured (Tr. 26), he later found that plaintiff met the special earnings requirements of the Act in January 1975 and continued to meet them through at least March 30, 1979 (Tr. 222). In its findings the Appeals Council chose to adopt March 31, 1979, as the date upon which plaintiff last met the "special involved status requirements (of the Act)" (Tr. 214).

Plaintiff now asserts but does not

present evidence to support the claim that he was insured under title II of the Act until December 1979. (Plaintiff's Supplemental Brief at 9). I cannot conclude on the basis of a purely conclusory challenge that the Appeals Council's finding is not supported by substantial evidence. Plaintiff has failed to establish that he met the statutory criteria for disability under the Act after April 1, 1979.

> prior work, and is unable to perform any other relevant work-related activity in the national and local economy.

(Tr. 222). The ALJ found further, however, that

> (a)s claimant was confined in a penal institution for the conviction of a felony during the relevant period noted herein and (until his recent release on November 15, 1982), and as claimant was not engaged in a court approved rehabilitation program during that period, claimant is not entitled to disability insurance benefits during that period under the authority of section 223(f) (1) of the Act.

Id.

On February 13, 1984, the Appeals Council declined to adopt the recommended decision of the ALJ, finding instead that plaintiff had not established a disability existing on or prior to March 31, 1979. In addition, the Appeals Council refused

to rely upon section 223(f)(1), reasoning that the question of disability must first be answered affirmatively in order to make relevant any inquiry into the "prisoner suspension" provisions of the Act (Tr. 198).[2]

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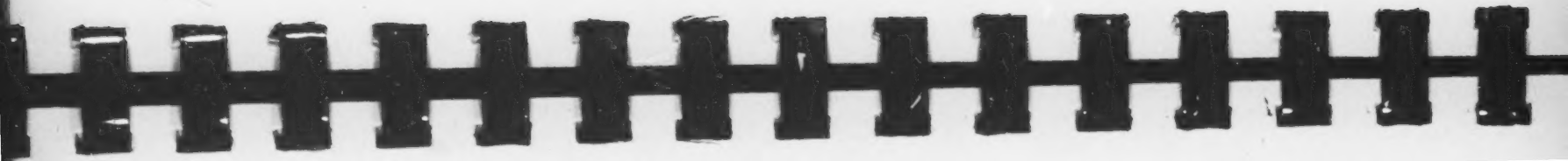
[2] In addition, the Appeals Council recognized that section 223(d) (6) (B) of the Act operates to exclude from consideration physical or mental impairments arising in connection with an individual's confinement in a penal institution pursuant to a conviction for a felony committed after October 19, 1980. The Appeals Council noted that although plaintiff's left knee was injured in January 1975 by the act of a fellow prisoner, the offense for which plaintiff was convicted occurred during 1974. Therefore, the Appeals Council found necessary an evaluation of the medical evidence bearing on plaintiff's left-knee impairment (Tr. 200).

During the pendency of this claim, P.L. No. 89-21 was enacted. There is some question as to its effect upon section 223 of the Act, but for the reasons which follow and the resulting disposition of the case, it is not necessary for the court to reach the issue.

The Secretary's decision to deny benefits will be upheld on review by a federal court if supported by "substantial evidence." Dobrowolsky v.Califano,



606 F.2d 403, 406(3rd Cir. 1979); 42 U.S.C. §405(g). The Supreme Court has defined substantial evidence as "'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison v. NLRB, 305 U.S. 197, 229 (1938)). Inferences and conclusions which are drawn from the basic facts are also afforded the conclusive effect of the substantial-evidence rule. Jolley v. Weinberger, 537 F.2d 1179, 1181 (4th Cir. 1976).

Disability is defined both for purposes of disability insurance and supplemental security income benefits as the inability "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be

expected to last for a continuous period of not less than 12 months." 42 U.S.C. §§423 (d) (1) (A), 1382c(a)(3)(A). A person is disabled within the meaning of these provisions "only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy." 42 U.S.C. §§423 (d)(2)(A), 1382c(a)(2)(A).

The applicable standards for disability evaluation under section 423 are enumerated in 20 C.F.R. §404.1520. These standards involve the weighing of four factors: (1) objective medical facts; (2) diagnoses or medical opinions based on such facts; (3) the claimant's subjective testimony of pain and disability; and (4) the claimant's education, age and work experience. Singletary v.

Secretary of HEW, 623 F.2d 217, 218 (2d Cir. 1980). Finally, it is well settled that plaintiff bears the burden of persuasion to establish an inability to engage in any substantial gainful activity. Rossi v. Califano, 602 F.2d 55, 57 (3d Cir. 1979).

Plaintiff submits four theories under which he claims to be entitled to benefits under the Act. First, he claims that he suffers from arthritis of a major weight-bearing joint within the meaning stated in subpart P, appendix 1, subsection 1.03. Plaintiff's Brief at 28. Second, he claims that he suffers from orthopedic, narcoleptic and cataplectic impairments which are equivalent to the neurological impairments lists in subsections 11.02 and 11.03 of appendix 1 to subpart P. Id. at 29-30; Plaintiff's Supplemental Brief at 1-3.

Third, although plaintiff agrees with the finding reached by the Appeals

Council that he cannot perform his usual work as a carpenter, he claims that it was error for the Appeals Council to find that this result was caused exclusively by his orthopedic impairment. Plaintiff's Brief at 31. Finally, plaintiff claims the Appeals Council's finding that he retains the residual functional capacity to do both sedentary and light work is not supported by substantial evidence. Plaintiff's Brief at 42.

When evaluating a disability claim, the Secretary follows a sequential, five-step test set forth in 20 C.F.R. §404.1520. Section 404.1520(d) provides that "(i)f you have an impairment which meets the duration requirement and is listed in Appendix 1, or we determine that the impairment is equal to one of the listed impairments, we will find you disabled without considering your age, education, and work experience." The Secretary has implemented this provision through 20

C.F.R. §404.1525 which provides a listing of impairments and describes, "for each of the major body systems, impairments which are considered severe enough to prevent a person from doing any gainful activity..." and shows the required level of severity of each impairment by one or more sets of medical findings consisting of symptoms, signs and laboratory findings. §404.1525(a), (c). Subsection (d) of section 404.1525 also sets forth that the impairment must have the findings shown in the listing of that impairment as well as the diagnosis of a listed impairment.

Plaintiff contends that his left-knee impairment is listed in appendix 1 of subpart P under subsection 1.03: "Arthritis of a major weight-bearing joint (due to any cause)".[3] The provision cited by plaintiff requires findings of limitation

[3] "Major joint" is defined to include the knee. §1.00 (D) of Appendix 1 to Subpart P.

of motion and enlargement or effusion in the affected joint, as well as a history of joint pain and stiffness. In addition, specific companion symptoms, signs and laboratory findings must also be present. See 20 C.F.R. §404.1528. These include "(g)ross anatomical deformity such as subluxation, contracture, bony or fibrous ankylosis, or instability; or ... (a)nkylosis of the hip...; or (r)econstructive surgery ... of a major weight-bearing joint (without return to) full weight-bearing status ... within 12 months of onset." §1.03 of Appendix 1 to Subpart P.

In its opinion the Appeals Council subjected plaintiff's claim to the rigor of 20 C.F.R. §404.1520, finding with respect to the knee injury that, as early as June 1975, an x-ray disclosed evidence of degenerative arthritis (Tr. 201).

In addition, an examing physician reported that the patella consistently subluxed laterally (id.) and recommendations were made that plaintiff undergo corrective surgery which was completed without complications on June 30, 1975 (Tr. 203).

After discharge plaintiff was transferred to the Trenton State Prison Hospital, where he was treated and observed until discharge on August 20, 1975. The Appeals Council has specifically noted that daily nursing-staff reports indicated that plaintiff voiced no complaints of pain during this time period (Tr. 203). An x-ray taken on August 20, 1975, disclosed that surgical procedures about the tibial area were healing (Tr. 162).

In post-discharge examination on August 29, 1975, H.C. Field, M.D. (an orthopedic consultant), noted considerable swelling of the knee present with significant restriction of motion (Tr. 169) and later, in September 1975, found

evidence of crepitation of the patella and some degree of atrophy of the left thigh; however, muscle turgor and range of motion had improved (Tr. 172). Crepitation of the patella continued to be present on November 13, 1975 (Tr. 173), and diminished patellar and achilles reflexes was noted on January 29, 1976 (Tr. 177). On June 21, 1976, nearly one year after corrective surgery and approximately 18 months after the initial injury, an x-ray revealed a "moderate" degree of osteoarthritic change (Tr. 179), the clear implication being that a degenerative change had taken place since the last examination.

On October 24, 1977, Dr. Field found a "slight" amount of crepitation of the patella, but went on to conclude that "there does not appear to be any increase in the arthritis as compared to old x-rays" (Tr. 406). Although he was not specific, in order to avoid an inconsistent inter-

pretation, this court must conclude that Dr. Field intended to refer to the x-rays taken on June 21, 1976. On November 11, 1977, however, Dr. Schnur, a radiologist, found "mild" secondary degenerative arthritic changes (Tr. 407).

The Appeals Council found, despite the absence of complaints of pain by plaintiff to the hospital staff, that plaintiff's knee injury would have imposed limits upon his ability to perform basic work-related activities, and that this limitation had occurred prior to the expiration of plaintiff's insured status on April 1, 1979 (Tr. 201). It was therefore necessary for the Appeals Council to continue the sequential analysis with an inquiry directed at determining whether plaintiff's left-knee impairment was either listed in appendix 1 or equivalent to an appendix 1-listed impairment.

Specifically citing the testimony of Dr. Bell, an examining osteopath employed

by the Trenton State Prison authorities (Tr. 62-69), and the opinion of Dr. Dennis, a non-examining neurologist designated by the Secretary (Tr. 9), and generally referring to"all (other) medical evidence," the Appeals Council concluded that plaintiff's "impairments, either singly or in combination, are not of the level of severity contemplated by any paragraph appearing in the 'Listing of Impairments'". (Tr. 201).

This court's review of both Dr. Bell's testimony and the report by Dr. Dennis compels the conclusion that neither report constitutes substantial evidence to support the finding of the Appeals Council that plaintiff's knee impairment is not of the level of severity contemplated by appendix 1. In his report dated December 3, 1976, Dr. Dennis explicitly notes that his comments "will be strictly addressed to (plaintiff's) narcolepsy" (Tr. 9). The report contains neither

comments nor conclusions relating to plaintiff's knee impairment. Similarly, Dr. Bell specifically qualified his own answers to plaintiff's counsel regarding the knee impairment as the following excerpt indicates.

> Q.Does that mean then his knee is to a certain extend (sic) immobile, he's lost some of the use of the leg?
>
> A. That's correct. With arthritis you are -- plus he has had surgery on the knee -- the combination is definitely going to give him some loss of function of that appendage. The exact amount of disability if you want to say, should be determined by an orthopod rather than myself.

(Tr. 65) (emphasis added).

Remaining to be examined is the general reference to "all (other) medical evidence" made by the Appeals Council (Tr. 201). The Secretary contends that the medical evidence clearly indicated that plaintiff's arthritic condition remained mild until 1982. Defendant's Brief at 8. Plaintiff responds that the results of a report dated July 21, 1982,

authored by Dr. Capotosta, an examining orthopedic specialist, reflects a diagnosis of severe panarthritis of the left knee, encompassing the patello, femoral, medial and lateral tibia femoral joints (Tr. 588). The Secretary's answer to this contention is that, even if accepted, Dr. Capotosta's report is not probative of plaintiff's arthritic condition prior to the expiration of plaintiff's insured status on April 1, 1979. Defendant's Brief at 9. The Secretary implicitly relies on the reports of treatment authored by Doctors Field and Schnur, finding "mild" and "moderate" degrees of osteoarthritis during continuing period of treatment prior to April 1, 1979 (Tr. 203-209). The record is devoid of x-ray evidence showing "severe" arthritis prior to April 1, 1979.

The Secretary correctly notes that evidence of an impairment which reached disabiling severity after the expiration

of plaintiff's insured status cannot be the basis for the determination of entitlement to a period of disability and disability insurance benefits. This holds true despite the fact that the impairment itself existed prior to the expiration of plaintiff's insured status. DeNafo v. Finch, 436 F.2d 737, 739 (3d Cir. 1971).

Although this court might have found otherwise had it considered the matter de novo on the narrow issue of whether, on or before April 1, 1979, plaintiff's knee injury accorded with the symptoms, signs and laboratory findings specified in subpart P, appendix 1, subsection 1.03, this court is constrained to find the Secretary's negative conclusion supported by substantial evidence.

Subsections 11.02 and 11.03 of appendix 1 of subpart P list as impairments neurological disorders diagnosed as epilepsy. Both sections require seizures, either major or minor, to be documented

by symptoms, signs and laboratory findings including electroencephalagram (EEG) results and a detailed description of a typical seizure pattern accompanied by all associated phenomena. In addition, major seizures must occur "more frequently than once a month, in spite of at least 3 months of prescribed treatment. With: A. Diurnal episodes (loss of consciousness and convulsive seizures); or B. Nocturnal episodes manifesting residuals which interfere significantly with activity during the day." Subpart P, Appendix 1, §11.02 Minor seizures must occur "more frequently than once weekly in spite of at least 3 months of prescribed treatment. With alteration of awareness or loss of consciousness and transient postictal manifestations of unconventional behavior or significant interference with activity during the day." Subpart P, Appendix 1, §11.03

Plaintiff argues that the synergistic effect of his orthopedic, narcoleptic and cataplectic impairments are equivalent to

the neurological impairments categorized as epilepsy under subsections 11.02 and 11.03. In support of this claim, plaintiff contends that the Appeals Council's explicit reliance upon a non-examining neurologist's report and testimony of an osteopath who lacked expertise in orthopedic medicine cannot be considered substantial evidence to support the conclusion that plaintiff's impairments either singly or in combination are not equivalent to the level of severity contemplated by subsections 11.02 and 11.03 of appendix 1.

As additional support, plaintiff contends that the Appeals Council's reliance upon an absence of manifested symptoms as well as the absence of complaints by him to physicians regarding narcolepsy or cataplexy or knee discomfort also cannot constitute substantial evidence to support the conclusion that plaintiff was not disabled as a result of his combined orthopedic and alleged neurological impairments. Plaintiff's Supplemental Brief

at 7-12.

The Secretary replies that the record in this case contains no evidence whatsoever of epilepsy. Defendant's Brief at 12. As further support, the Secretary cites as persuasive the fact that at least one court has held that a person suffering from narcolepsy and cataplexy did not meet the listings requirement. See Hosley v. Secretary of Health and Human Services, No. 81-128, slip op. (D. Mass. Aug. 23, 1984); Sancartier v. Schweiker, No. 76-4072, slip op. (D. Mass. May 19, 1981). Upon close examination, this court finds the cited cases to be inapposite.

In Hosley, the record clearly revealed as normal each test conducted by plaintiff's neurological expert. Hosley at 4. Here, in stark contrast, both parties agree that plaintiff's EEG results clearly support with objective medical findings the diagnosis of narcolepsy with cataplexy. Further, the plaintiff in

Hosley apparently argued that he met the listed requirements of appendix 1, subsection 12.00. Hosley at 6. There is no evidence in the opinion to justify the conclusion that plaintiff presented the court with an "equivalence" argument. In addition, plaintiff here has directed the Secretary's attention to subsections 11.02 and 11.03 of appendix 1 and has not argued "equivalence" with respect to subsection 12.00.

Sancartier v. Schweiker presents a much closer issue with respect to the district court's conclusion that substantial evidence existed to support a finding by the ALJ that medication adequately controlled plaintiff's narcolepsy. The opinion, however, reveals neither a "cumulative impairment" argument nor an "equivalence" argument. Sancartier at 1. Sancartier, therefore, does not speak to the specific issue of "equivalence" raised here by plaintiff. For the reasons which follow

it is simply not adequate to end the inquiry with a finding that plaintiff's impairment is not listed in appendix 1 of subpart P.

The meaning of medical equivalence as described by 20 C.F.R. §404.1520(d) is elaborated in 20 C.F.R. §404.1526 which provides in part

> (w)e will decide that your impairment(s) is medically equivalent to a listed impairment in Appendix 1 if the medical findings are at least equal in severity and duration to the listed findings. We will compare the symptoms, signs, and laboratory findings about your impairment(s), as shown in the medical evidence we have about your claim, with the medical criteria shown with the listed impairment. If your impairment is not listed, we will consider the listed impairment most like your impairment to decide whether your impairment is medically equal. If you have more than one impairment, and none of them meets or equals a listed impairment, we will review the symptoms signs, and laboratory findings about your impairments to determine whether the combination of your impairments is medically equal to any listed impairment.
>
> ....We will always base our decision about whether your impairment(s) is medically equal to a listed impairment on medical evidence only. Any medical findings in the evidence

> must be supported by medically acceptable clinical and laboratory diagnostic techniques. We will also consider the medical opinion given by one or more physicians designated by the Secretary in deciding medical equivalence.

20 C.F.R. §404.1526(a), (b) (emphasis added). As the Third Circuit has noted, however, "(t)he problem, of course, is that medical problems are largely incommensurables; the Secretary's regulations require him to perform the arguably impossible (or meaningless) task of adding apples and oranges..." Wier ex rel. Wier, 734 F.2d 955, 963 (3d Cir. 1984) (citation omitted).

The medical evidence of record indicates that plaintiff had been diagnosed as suffering from narcolepsy with cataplexy as early as November 1966. Laboratory findings included results of an EEG described as "grossly" abnormal (Tr. 116). Dr. Edward S. Cooper, a treating physician noted "frank seizure activity" (Tr. 116). At least five other physicians have confirmed the accuracy of this diagnosis and,

in fact, the Secretary does not dispute the diagnosis. The issue to be resolved is whether plaintiff's narcolepsy and cataplexy had by March 31, 1979, deteriorated to a point where medication no longer prevented plaintiff's combination of impairments from rising to the level of severity contemplated by appendix 1, subsections 11.02 and 11.03.

Once again, the Secretary specifically cites the testimony of Dr. Bell and the report authored by Dr. Dennis, along with the non-specific reference to "all (other) medical evidence" (Tr. 201). As previously noted, Dr. Dennis, a non-examining physician, confined his analysis strictly to the issue of plaintiff's impairment due to narcolepsy and cataplexy. The report states that

> (i)n general, individuals with narcolepsy respond readily to the use of stimulants such as Ritalin. In addition, individuals with narcolepsy can generally avoid narcoleptic attacks if they are engaged in stimulating activity. Avoidance of attacks does not require prolonged ambulation, but rather that the individual engage

in stimulating activities. This can include desk work, reading, etc., and does not require physical activity.

Basically, individuals with narcolepsy with appropriate medication and appropriate stimulating environment, are generally not impaired in terms of work activity. This certainly would appear to be true in the claimant's case.

(Tr.9) (emphasis added).

Plaintiff responds with persuasive authority that the opinion of a non-examining neurologist cannot without more severe as substantial evidence to support a finding of non-disability. Tingling v. Secretary of Health and Human Services, 575 F. Supp. 905, 909 (S.D.N.Y. 1983); Karp v. Schweiker, 539 F. Supp. 217, 219 (N.D. Cal. 1982). The Secretary correctly notes, however, that a non-examining medical advisor's opinion can constitute substantial evidence if it is supported by the findings or opinions of an examining physician. Rodriguez v. Secretary of Health and Human Services, 647 F.2d 218, 224 (1st Cir. 1981). The Secretary

has specifically invoked Dr. Bell's testimony to fulfill that supporting role.

In that testimony, Dr. Bell, in response to a question by plaintiff's counsel remarked that

> (plaintiff is) being treated for narcolepsy, which has been documented in his folder from a neurologist... The causes are, these symptoms that you're going to -- that he's going to see or you might see are the fact that he's going to fall asleep without any warning and at inopportune times and there is no pattern to it. He is therefore being treated by the usual therapy as recommended by the neurologist, of taking Dexedrine, spancels (phonetic) and tablets on a regular basis at regular intervals so that he could function. For instance if he does not have his medication as he related to me a couple of weeks ago and attempts to go to class, he will fall asleep, so he's got to have the medication at specific times so that he can function.

(Tr. 64). Dr. Bell also testified that plaintiff would be more likely to fall asleep if he were in a relaxed condition and inactive, and also that medication would keep him alert if he got it at regular intervals (Tr. 66).

The Secretary contends that the Appeals Council could justifiably infer from Dr. Bell's testimony that plaintiff's narcolepsy had been adequately controlled by medication during the time of plaintiff's incarceration. This was true at least when prison medical personnel, in possession of the medication for security reasons, were able to accomplish delivery to plaintiff. As additional support, the Secretary notes that the medical evidence of record indicated that the medical professionals who treated plaintiff throughout the extensive time period or plaintiff's incarceration did not report the manifestation of any marked narcoleptic symptoms. Plaintiff in rebuttal cites a contrary conclusion in a report by Dr. Michael J. Thorpy, Director of the Sleep-Wake Disorder Center at Montefiore Hospital, New York, which states in part that

> (t)he patient is severly disabled by the Narcolepsy and Cataplexy. In addition, he has orthopedic problems

with his knees which are contributing to his disability. He is unable, at the present time, to do any type of gainful employment. The medications may improve his functional capacity but the underlying condition cannot be reversed and is a lifetime disorder.

(Tr. 263). In a letter to the ALJ, Dr. Thorpy further stated in part

> (a) diagnosis of Narcolepsy is made on a Multiple Sleep Latency test when there are two or more sleep onset REM periods. Mr. Taylor had four sleep onset REM periods. The false positive rate for this test for Narcolepsy is less that 5%. Therefore, the clinical impression of Narcolepsy plus a positive Multiple Sleep Latency test confirms the diagnosis of Narcolepsy which, in my opinion, is indisputable.
>
> Mr. Taylor is severly affected by his disease. It is not possible to predict to what extent his symptoms will be relieved by medications other than to say that it is virtually impossible to return him to a normal functioning level by the use of any medications. We can determine the degree of improvement by placing him on medications and then repeating polygraphic testing and then we can have an objective way of assessing whether his daytime sleepiness now has returned to normal values. The normal mean onset to sleep is greater than 10 minutes. Mr. Taylor had a mean onset to sleep of 1.1 minutes. Patients with Narcolepsy usually have a mean onset to sleep of less than 5 minutes. Therefore, Mr. Taylor is severely sleepy and any

> improvement by medications can only be subjective unless this form of testing is repeated.

(Tr. 264). Dr. Thorpy further stated in a letter to counsel for plaintiff, dated December 2, 1982, that

> (t)he most common age for narcolepsy to present is in the second decade. From Mr. Taylor's description to me, plus evaluation of his records, I have no doubt that his narcolepsy began after the age of 14 years, approximately in 1959. This is based upon his own testimony and the report of Dr. Edward S. Cooper which was done in 1966. Narcolepsy, even when treated, is a disabling condition, and I have no doubt that he has been totally disabled from at least 1966, again, according to the medical report at that time.

(Tr. 301). Plaintiff points to conclusions in accord with this opinion by the ALJ, two non-examining neurologists, plaintiff's own testimony, as well as affidavits submitted by those persons who have over several years known and observed plaintiff. Plaintiff's Brief at 32; Plaintiff's Supplemental Brief at 12-14.

The crucial issue here is whether

plaintiff's impairments reached the level of severity contemplated by subsections 11.02 and 11.03 prior to the expiration, on March 31, 1979, of plaintiff's insured status under title II of the Act. In view of the testimony of Dr. Bell, the lack of manifested symptoms occurring while plaintiff was regularly taking prescribed medication under the observation of medical professionals at Trenton State Prison, the opinion of Dr. Dennis as to the general response of narcoleptics to drug therapy, and the general reference to "all (other) medical evidence" (from which this court again infers a reference to the medical reports authored by Dr. Field), it is possible to conclude that the Secretary considered the combined effects of plaintiff's impairments when she concluded that plaintiff's impairments did not rise to the level of severity contemplated by subsections 11.02 and 11.03 of appendix 1. It is also clear that the Secretary had to choose be-

tween two fairly conflicting views of the medical evidence. Although this court may have found otherwise had it considered the matter de novo, on the narrow of issue of whether prior to the expiration of his insured status plaintiff's combined impairments were equivalent to the symptoms, signs and laboratory findings specified in subsections 11.02 and 11.03, this court is constrained to find the Secretary's negative conclusion supported by substantial evidence.

Plaintiff's final two arguments are interrelated. Plaintiff contends that his narcolepsy contributed to his inability to perform his prior work as a carpenter. The Secretary in response cites the evidence which supports a conclusion that plaintiff's narcolepsy with cataplexy was adequately controlled by medication during the time prior to April 1, 1979. The issue to be resolved is whether the evidence which this court has concluded

is substantial enough to support the conclusion that plaintiff's impairments did not rise to the level of severity contemplated by subsections 11.02 and 11.03 can now be employed by the Secretary in examining plaintiff's residual functional capacity.

Section 404.1520(e) directs an inquiry into plaintiff's residual functional capacity in order to determine whether plaintiff can continue to do the work which he has done in the past. The Appeals Council found that

> (plaintiff's) knee injury and its sequelae would have prevented him (through March 31, 1979) from standing and walking for prolonged periods, lifting and carrying objects weighing more than 10 pounds, climbing ladders, operating machine controls with his left leg, and from kneeling. These limitations would have prevented the claimant from performing his usual work as a carpenter.

(Tr. 207). The Appeals Council also found, however, that plaintiff's narcolepsy would not have affected plaintiff's residual functional capacity.

There is evidence on record to substantially support this finding. The record indicates that plaintiff continued to work until his arrest in November 1974 (Tr. 79). A history of working while under an impairment controlled by medication can be the basis for a finding of adequate residual functional capacity at least in those cases where the record shows no evidence of a significant deterioration of plaintiff's impairment. Goodermote v. Secretary of Health and Human Services, 690 F.2d 5, 7 (1st Cir. 1982).

Finally, plaintiff cites as not supported by substantial evidence the Appeals Council's finding that he retains the residual functional capacity to do both sedentary and light work. In support of this claim, plaintiff argues that both the pain associated with his knee impairment and the manifestations of the neurological impairments in combination significantly

diminish his capacity for substantial gainful activity. Plaintiff's Brief at 43. As further support, plaintiff argues that the Secretary failed to consider the cumulative effects of plaintiff's narcolepsy, cataplexy and knee impairment upon his residual functional capacity. Plaintiff's Supplemental Brief at 12; Plaintiff's Brief at 27.

The Secretary responds that plaintiff's subjective complaints of knee discomfort, drowsiness and sleep attacks are not credible. As support, the Secretary notes that plaintiff testified that he took only mild analgesics to relieve his knee discomfort (Tr. 69). Having reviewed all of the evidence presented, the court cannot conclude that the Secretary's conclusion was not based on substantial evidence.

The record demonstrates that the Secretary's determination of non-disability is supported by substantial evidence. On the basis of the record

presented, this court affirms the Secretary's denial of disability and disability insurance benefits. An order accompanies this memorandum. No costs.

May 30, 1985.

APPENDIX 5

Department of
HEALTH AND HUMAN SERVICES
Social Security Administration
Office of Hearings and Appeals

DECISION OF APPEALS COUNCIL

In the case of	Claim for Period of Disability Disability Insurance Benefits
Julius Taylor (Claimant)	
Wage Earner	202-34-2877 Social Security No.

ON REMAND FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
(CIVIL ACTION NUMBER 78-2997)

On March 31,1981, the United States District Court for the District of New Jersey issued a decision affirming the decision of the Secretary of Health and Human Services dated February 28,1980, which found that the claimant was not disabled and, therefore, not entitled to disability insurance benefits. Subsequently,the claimant submitted additional medical evidence to the Court, consisting of the affidavits of Drs. John W.Vester and Erich W.H.

Simon (dated July 7,1981 and July 9, 1981, respectively), along with a motion requesting that the Court reconsider its March 31,1981 decision, relieve him from that judgment, and remand the case to the Secretary for consideration of the new medical evidence. The Court granted the claimant's motion by Order dated August 4, 1981 and remanded this case to the Secretary for the above-stated purpose. The Court also instructed the Secretary to "....issue any appropriate orders to obtain neurological examinations of the incarcerated plaintiff" (Order, page 2). Thereafter, the Appeals Council remanded this matter to an administrative law judge by Order dated March 30,1982. After receiving additional evidence, the administrative law judge issued a recommended decision on December 7,1982, to which objections dated December 22,1982 and January 5,1983 were received.

After consideration of the record, the Appeals Council wrote to the claimant's attorney on February 10,1983, requesting additional evidence. Counsel responded on February 28,1983 and March 11,1983, and on April 7,1983, he was granted in the "List of Exhibits" attached to this decision. A letter from counsel to the administrative law judge dated April 6, 1982 has been received in evidence as Exhibit AC-22. Accordingly, this case is now before the Appeals Council for final administrative action.

The Appeals Council's correspondence, counsel's letters, and the medical and other evidence submitted by the claimant have been entered into the record by the Appeals Council as Exhibits AC-1 through AC-21 and are more fully described in the "List of Exhibits" attached to this de-

cision. A letter from counsel to the administrative law judge dated April 6,1982 has been received in evidence as Exhibit AC-22. Accordingly, this case is now before the Appeals Council for final administrative action.

The Appeals Council has carefully reviewed the entire record as now constituted in light of counsel's numerous exceptions to the administrative law judge's recommended decision. Therein, the administrative law judge found that the claimant was last insured for disability insurance benefits under title II of the Social Security Act on March 31,1979, and concluded that the claimant became disabled during January 1975 due to narcolepsy (Recommended Decision, pages 3,6). It was also the opinion of the administrative law judge that, in view of the claimant's conviction for a felony (during July 1975) and

his imprisonment throughout the period during which he had been under a disability until November 15,1982, when he was released from prison, the provisions of section 223(f) (1) of the Social Security Act, as amended, were applicable. As noted by the administrative law judge, these provisions required suspension of the claimant's disability insurance benefits between January 1975 and November 1982. He also noted that benefits payable to any individuals because of the entitlement of the claimant (e.g., his children and wife) would not be affected by the "prisoner suspension" provisions discussed above (Recommended Decision, pages 4,6).

In view of the administrative law judge's finding with respect to the date on which the claimant last met the special insured status provisions of the Act with respect

to title II disability insurance benefits, the Appeals Council notes that the claimant must establish that he was " under a disability" on or before that date.

When considering the administrative law judge's recommendation and the evidence bearing on the claimant's impairments, the Appeals Council has been guided by the Secretary's regulations governing the "sequential evaluation" of all disability claims arising under title II of the Act, appearing at section 404.1520 et seq. of Regulations No. 4, Subpart P. The Council also has been guided by the Rulings of the Commissioner of Social Security which are binding on all components of the Social Security Administration, including the administrative law judges and the Appeals Council (see section 422.408, Regulations No.22, Subpart D).

In addition, during the pendancy of this claim before the Appeals Council, Public Law 89-21 was enacted. Section 339(b) thereof struck out subsection (f) of section 223 of the act (the "prisoner suspension" provisions cited above), effective with respect to monthly disability insurance benefits payable for months beginning after April 20,1983, and added subsection (x) to section 202 of the Act, which,although it provided for the suspension of benefits, also provided that benefits nevertheless could be paid under certain circumstances, to an incarcerated prisoner. However, despite these recent amendments to the Social Security Act, it is the opinion of the Appeals Council that it must first be established that a claimant is "disabled" before questions about the applicability of the "prisoner suspension" provisions are addressed and resolved. If the claimant is found not to be "dis-

abled" at any step in the "sequential evaluation" process described above, then the issues of whether or not he is a convicted felon and the application of the benefit "suspension" requirements of the Act are not relevant.

Finally, before evaluating the medical evidence of record, the Appeals Council notes that a January 20,1975 Camden County Sheriff's Department request for the examination of the claimant indicates that he sustained an injury of his left knee while in jail when struck by another prisoner with a board (Exhibit 13, page 17 (Court Transcript (hereinafter abbreviated as "CT"), page 131)), and that he subsequently underwent surgery on that knee during mid-1975 (Exhibit 14). In a letter dated September 22,1978 (Court Transcript page 13), the claimant's previous attorney observed that the left

knee impairment occurred as a result of an "incident" which took place while the claimant was in prison. The claimant also has attributed his knee troubles to an injury sustained while a prisoner (CT, pages 93 and 99).

Section 223(d)(6)(B) of the Social Security Act states that any physical or mental impairment arising in connection with an individual's conviction for a felony shall not be considered when determining whether he is under a disability. The Council notes, however, that this provision of the Act is effective only with respect to felony convictions for offenses which occurred after October 19,1980 (P.L. 96-473; 94 Stat.2263).

In his objections to the recommended decision (see Exhibits AC-19 and AC-20), the claimant's attorney has argued that

because his client's 1975 conviction was overturned and the indictments dismissed (except for one pertaining to a handgun-related offense, a "high misdemeanor" and not a "felony" according to New Jersey statute 2A:151-41 (see Exhibit AC-19, page 7) to which the claimant pled guilty), he has never been convicted of a felony. Although the Council has carefully considered the attorney's conclusions and is of the opinion that, for the reasons he has given (see Exhibits AC-2, AC-3, AC-6, and AC-19, pages 1-5), they have considerable merit, the Council notes that the question of whether or not the claimant was convicted of a felony need not be definitely resolved prior to an evaluation of the medical evidence bearing on the claimant's left knee dysfunction because section 223(d)(6)(b) applies only to those instances in which the felony occurred after October 19,1980 for which an indi-

vidual was subsequently convicted and incarcerated in a penal institution. This provision of the Act is, in part, the subject of Social Security Ruling 83-21 (January 1983 Edition) pages 103-104)) which states in pertinent parts

> "The law (P.L.96-473) provides that title II*** determinations of disability for prisoners and persons convicted of felonies will be restricted as follows:
>
> 1. Any physical or mental impairment which arises or is aggravated (but only to the extent of the aggravation) in connection with the commission of an offense after October 19,1980, which constitutes a felony under applicable law,and for which the individual is subsequently convicted,shall not be considered in determining whether the individual is under a disability. This exclusion applies regardless of whether the individual is incarcerated pursuant to conviction. (The impairment or aggravation of an impairment must be excluded for the lifetime of the individual.)
>
> 2. Any physical or mental impairment that arises or is aggravated (but only to the extent of the aggravation) in connection

> with the individual's confinement in a jail,prison,or other penal institution or correctional facility pursuant to such individual's conviction of an offense committed after October 19,1980 constituting a felony under applicable law, shall not be considered in determining whether such individual is under a disability for purposes of benefits payable for any month during which such individual is so confined." (Emphasis added.)

Consequently, even if the Council were to conclude that the claimant committed a felony offense during 1974 for which he was subsequently convicted in 1975, it is evident that both offense and the conviction occurred long before the effective date of section 223(d)(6)(B),and that this section of the Act,as further explained in Ruling 83-21, would not preclude the Council from considering the severity of the claimant's knee impairment when determining whether he is under a disability. As noted earlier, during

the discussion of the "prisoner suspension" provisions of the Act appearing above, a definitive resolution of the question of whether the claimant was convicted of a felony would be necessary only if he was found to be disabled.

EVALUATION OF THE EVIDENCE

When the claimant filed his application for benefits on April 20,1976, he stated that he was born on May 20,1945, and alleged that he became disabled because of "left knee surgery" during January 1975 (Exhibit 1, page 1). In Medical History and Disability Reports signed by the claimant on January 13,1977, February 28,1977, and August 16,1977 (Exhibits 10-12,respectively), he indicated, among other things that his left knee had been injured while in prison (Exhibits 10, page 1; 11, page 1), that he completed either the 11th or 12th grade (Exhibits 11, page 1; 12,

page 1) and that, in addition to his knee problems, he also was prevented from working by narcolepsy (Exhibit 12, page 1).

The first step in the Secretary's "sequential evaluation" procedure (section 404.1520(b) requires a finding that a claimant is not disabled if the evidence establishes that he has worked in "substantial gainful activity" (as defined in sections 404.1571 -404.1574, Regulations No.4, Subpart P)). In this case, the evidence shows that the claimant has not engaged in substantial gainful activity at any time during the pendency of his claim.

In the "sequential evaluation" procedure, the second step (section 404. 1520(c)) is to determine whether a claimant has a "severe" impairment (as defined in Section 404.1521). An

impairment is considered to be severe if it limits a claimant's physical ability to perform basic work-related activities, including for example, walking, standing, lifting, carrying, or if it limits his mental capacity to understand, carry out, and remember simple inntructions.

In this case, the medical evidence shows that after the claimant's knee was injured on January 20, 1975 (CT, page 131) a June 29,1975 x-ray disclosed several loose synovial varus in the posterior of the knee with evidenne of degenerative arthritis (CT, page 137). Clinically, although the range of motion was found to be full, the examining physician reported that the pa= tella consistently subluxed laterally (CT, page 135). The following day surgery was performed consisting of a Hauser procedure with advancement of the vastus medialis (CT,

pages 138-139). When seen on August 29, 1975, considerable swelling of the knee was still present along with restriction of motion, and the examining physician concluded that the claimant should avoid weight-bearing on the left leg by using crutches (CT, page 169). The examination of September 15,1975 disclosed crepitation of the patella and 3/4" of atrophy of the left thigh (CT, page 172), which was still present on both November 13,1975 (CT, page 173) and June 21,1976, when an x-ray of that date revealed a "moderate" degree of osteoarthritis change (CT, page 179).

Medical records submitted by counsel show that an examining physician found on October 24,1977 that, while the atrophy largely had been overcome by that date, muscle turgor was not con-

sidered to be good and x-rays again disclosed abnormalities attributed to degenerative arthritis (Exhibit AC-13, pages 25,26). These records also show that some atrophy was present on May 31,1979 (Exhibit AC-15, page 1).

Inasmuch as it is evident that the claimant's knee problem would affect his ability to perform some of the basic work-related functions described above, the Appeals Council is of the opinion of the claimant does have a "severe" impairment and that, consequently, the combined effect of this condition as well as the narcolepsy and cataplexy must be considered (see Social Security Ruling 82-56 (Cumulative Edition 1982), page 112)).

Since a "severe" impairment exists, the next step in the "sequential evaluation" requires a determination as to whether a claimant's impairment or combination of impairments meet or equal the level of severity described in any applicable paragraph of "Appendix 1 -- "Listing of Impairments" to Regulations No. 4, Subpart P. After carefully considering all of the medical evidence, including the May 18,1978 testimony of Dr. Conrad E.Bell, the prison physician who treated the claimant since November 1977 (CT, pages 62--69) and the opinion (CT, page 9) of a physician designated by the Secretary (see section 404.1526, Regulation No.4), it is the opinion of the Appeals Council that the claimant's impairments, either singly or in

combination, are not of the level of severity contemplated by any paragraph appearing in the "Listing of Impairments."

The fourth step (section 404.1520 (e)) of the "sequential evaluation" requires an assessment of a claimant's "residual functional capacity" (as defined in sections 404.1545) and the physical and mental demands on his past work activity. A claimant found to be able to do work done in the past will be found not to be disabled. For those cases before the Appeals Council, the responsibility for assessing and determining residual functional capacity rests with the Appeals Council (see section 404.1546, Regulations No.4).

With respect to the claimant's

previous work activity, he has stated that he was a carpenter in the construction industry between 1964 and November 1977, doing both inside and out-of-doors work, building ceilings and putting up studding (CT, pages 93, 95, 99, 101 and 108). According to his testimony on May 18, 1978, the tools used in his work included a saw,hammer, catspaw, stripping bar, ruler, square, gauges, a plumb blob, wrenches,and screw-drivers. He indicated that he began his career as a carpenter by first learning cabinetmaking and then by undertaking an apprenticeship from 1965 until 1969 when he graduated (CT, pages 69-71). He characterized his work as being "heavy" physical activity (CT, page 75).

Section 404.1567(c) defines medium work as requiring lifting no more than 50 pounds at a time with frequent lifting and carrying of objects weighing up to

25 pounds. Heavy work is defined as lifting not more than 100 pounds with frequent lifting and carrying of 50 pound objects (section 404.1567(d). In light of the claimant's testimony and in view of the documentary evidence, the Council is of the opinion that his previous work was in the medium to heavy exertional range. In addition, because of the claimant's cabinetmaking training, and his testimony with respect to the use of various measuring devices (square, ruler, gauges, and plumb blob (a weight hung at the end of a line to determine whether a wall, for example, is perfectly vertical)), it appears to be clear that this work activity had characteristics of semi-skilled work (as defined in section 404.1568(b)) as well as skilled work (as defined in section 404.1568(c)), which includes making exacting measurements, determining the proper machine or hand tools to be used,

or selecting the manual operations to be performed to accomplish the work to be done.

From the standpoint of the claimant's knee impairment, the evidence shows that when he was imprisoned in the Camden County Jail, he was questioned about his medical history on December 4,1974 and December 11,1974 (CT, page 123) and, while he indicated that he had sleeping sickness (but was not taking any medication for the problem), he had no other complaints. No physical abnormalities were noted by the physicians who examined him on December 5, 1974 and December 18,1974 (CT, pages 126, 127).

As noted earlier,the claimant sustained the knee injury on January 20,1975 (CT, page 131), when Norgesic was prescribed and he was allowed to recouperate in the

infirmary for one week (CT, pages 121,129). Subsequently, he was examined in the orthopaedic clinic on January 29,1975 (CT, page 120), February 19,1975 (CT, pages 119,129) and on April 19,1975 (CT,page 122) and ultimately was hospitalized on June 29,1975 for inpatient treatment of his knee at the Cooper Hospital (see CT, page 132).

The admission physical examination disclosed a normal range of motion in the knee with good cruciate and collateral ligamentous stability. The examining physician observed, however, that the patella consistently subluxed laterally. Although there was no effusion, crepitus and pain were present. No abnormalities of the claimant's right knee were noted (CT, page 135). X-rays of the left knee disclosed several loose synovial varus in the posterior aspect of the joint space with evidence of degenerative spur-

ring about the femoral condyles, patella, and tibia. No significant abnormalities of the right knee were notice (CT, Page 137). On June 30, 1975, the claimant underwent a Hauser procedure on the knee. According to the operating surgeon, the claimant tolerated the procedure well, and there were no complications (CT, pages 136, 138-139). He was dincharged on July 5,1975 in improved condition and with a good prognosis (CT, page 132).

On July 15,1975, the claimant was instructed to "..walk on his leg and to get rid of the crutches as tolerated" (CT, page 121). By July 25,1975, prison officials considered him to be a "hospital case" (CT, page 143) and he was transferred to the Trenton State Prison Hospital, where upon admission, he "refused" to sign a consent form granting the hospital medical staff permission to treat him

(CT, page 145). When admitted to the hospital ward at 5:30 p.m., the attending nurse observed that the claimant was "resting quietly" and that no medications were given. The following day, another nurse noted that he had a "quiet day", took no medications, and had "no complaints" (CT, page 155).

Dr.H.C.Field examined the claimant on July 31,1975, and noted that the claimant's left leg was in a long leg cast. However, there was no evidence of lymphadenopathy (CT, page 160). Although the claimant complained that the cast was too tight (CT, page 155), Dr. Field reported on August 7,1975 that the vascularity of the left foot appeared to be good and that the posterior tibial pulse was strong (CT, page 161). According to Dr. Field's August 11,1975 note, an x-ray of the leg (taken through

the cast (CT, page 163)) disclosed that surgical procedures about the tibial area were healing (CT, page 162). On August 15,1975, Dr. Field removed the cast and observed that the claimant's knee was healing well (CT, page 164). Later than afternoon, a nurse noted that the claimant had no complaints; no complaints were offered by the claimant on August 16, August 17, and August 18 according to the nurses' daily reports (CT, page 154), and on August 20,1975, the claimant was discharged from the hospital with instructions to continue exercises and whirlpool treatments (CT, pages 151, 164,168).

Dr.Field reexamined the claimant on August 29,1975 and noted that while there was considerable swelling about the knee, there was little or no extra fluid. The turgor of the quadriceps muscles was poor and the range of motion was from 0^{o} to 80^{o}. The claimant was

instructed to continue with his whirlpool treatments, avoid weight-bearing on the left knee by using crutches (CT, page 169). By September 15, Dr. Field noted crepitation of the patella and 3/4" of atrophy of the left thigh. Muscle turgor was improving and the range of motion had increased from 0^{o} to 85^{o} (CT,page 172). When evaluated on November 13, Dr. Field observed that only "some" soft tissue swelling was present and that no extra fluid could be detected in the knee. He also found that a "good" range of motion existed in the knee and that the muscle turgor continued to improve. He instructed the claimant to continue with his isometric exercises and whirlpool bath, and indicated that the claimant could continue to have his meals in his cell (CT, page 173, 174).

Although a report dated January 29,1976 concerning a recent physical examination dis not disclose any functional limitations of the claimant's knee, it was noted that there was some decrease in the patellar and Achilles reflexes (CT, page 177). Dr.Field noted on June 21, 1976 that the claimant used a cane while walking and that the atrophy of the left thigh was still present (CT, page 178). The x-ray of the knee done the following day disclosed that the multiple bony bodies seen on August 15,1975 had disappeared, that substantial healing had occurred, and that "moderate" osteoarthritis could be seen involving the sub-patellar articulation (CT, page 179). Although Dr. Field reexamined the claimant on July 19,1976 (CT, page 182), he observed only that the Hauser procedure was healing well.

During 1977, one of the prison physi-

cians recommended a one hour period of morning exercise (AC-13, page 4), and while hospitalized because of cold symptoms in early September, these improved with treatment. One of the nurses observed that the claimant was out of bed ("OOB") and that he had no complaints. A few days later, another nurse noted that he was in "good" spirits and was socializing with other patients (AC-13, pages 6,7). Later that month, the claimant was readmitted to hospital, complaining of cold symptoms (AC-13, page 18), which again improved with treatment. However, while an inpatient, the nursing staff noted that, for example, on October 9, 1977 no complaints were voiced, and that the following day was spent quietly, without any complaints (AC-13, page 19). Similarly, during the period from October 11 through October 27, when

he was discharged, the nursing notes disclose that he had no complaints at all, and that he was observed to be alert, walking about the ward, and playing chess (AC-13, pages 20-21). And, when examined by Dr.Field on October 24, he noted that the atrophy of the thigh muscles had been overcome and there was only a "slight" amount of crepitation of the patella. The x-ray of October 21, (see AC-12,page 26) disclosed "mild" arthritis of the knee joint, and Dr. Field observed that, after comparing old films, there did not appear to have been any increase in the extent of arthritis (AC-13, page 25).

Records of prescribed medications given during April, August, and September through December 1977 disclose that the claimant was given medication for his "sleeping sickness". However, these records do not

show that any prescription was given for arthritic discomfort (AC-13, pages 15, 22-24, 28-32). Medication records covering the period from January 1978 through April 1978 also show that no pain relieving medications were prescribed (AC-14, pages 10-15). The remainder of the pertinent medical records submitted by counsel do not reveal that the claimant complained about or was treated for his knee during 1978 (AC-14, pages 1-3, 7-8). Moreover, copies of the doctor's call sheets which record the claimant's complaints during 1978 disclose that while he did complain of some rectal pain due to hemorrhoids from time to time and an isolated episode of left shoulder discomfort, there were no complaints voiced concerning his knee at any time (AC-10, pages 4-5).

At the hearing of May 18,1978, the claimant did not specifically testify with re-

spect to his knee symptoms or limitations. However, in his initial testimony he attributed his inability to work to the problems which began when first imprisoned (CT, pages 49-50). Dr. Bell testified that although there was x-ray confirmation of arthritis of the knee, and the claimant used crutches at that time, the only medication consisted of plain aspirin with the exception of a few occasions when flareups occurred which were treated briefly with cortisone derivative medication (CT, pages 65-69).

Doctor's call sheets for the period prior to August 1,1979 (AC-10, pages 6-7) reveal that he requested a check-up, and complained about a "mild" wheeze as well as a rash on his buttocks. When seen again by Dr.Field on May 31,1979, he found that the left patella had only a trace of crepitation and that there was no

tenderness over the joint surface either medically or laterally. When the claimant flexed his knee to 90°, "some" discomfort occurred. However, there was no instability. Muscle tone was better and there was only about 1/4" of left thigh atrophy. X-rays showed no significant change in the arthritis (AC-15,page 1).

Other 1979 prison medical records do not reveal that the claimant had any specific complaints about his knee (AC-10, pages 8-9). However, on October 9,1979, he was hospitalized as a result of a beating he received the previous Saturday afternoon, complaining of pain in both knees, his left shoulder, and right thumb. Although some "mild" swelling and other "mild" problems were initially noted (AC-15, page 6), when examined on October 15 (AC_15, page 31), it was noted that the claimant's knees were not tender and that he was "unwilling to flex (his

knees) past 90°. However, when seated flexion to 90° done (and) past 90° was not painful when distracted" (AC-15, page 31). On October 18, Dr.Field observed that the claimant's thumb was not swollen, and that while his knees were not swollen, there was "some" limitation of motion. However, there was no instability (AC-15, page 20). (See also AC-15, pages 33-34). After treatment of his injuries, the claimant was discharged on November 5,1979 (AC-15, page 18).

At the end of November, the claimant was ordered to serve a disciplinary 3 day lock-up, and was granted permission to do the time in the hospital (AC-15, page 30). There, nurses observed him around the clock and recorded his complaints and activities. However, their reports (AC-15, pages 35-36) do not reflect any problems with knee discomfort. Other nursing notes for the

period from December 4, through December 7 similarly do not reflect any complaints of knee discomfort (AC-15, pages 37-38), and according to a physician's examination notes for December 7,1979, the doctor was "..convinced that there is no pathology in the left shoulder. Now he is starting to c/o (complain of) back pain. Imp. (Impression) - Malingering" (AC-15, page 43). The claimant was given additional lock-up time during mid-December which was served in the hospital (see AC-15, page 48). Nurses' notes, however, disclose no complaints of knee discomfort (AC-15, page 41).

During 1980, the doctor's call sheets for the period through May 4, while recording complaints about headaches, discomfort in the neck and shoulders from time to time, not being allowed enough time to take a bath, "non-specific discomfort" in his

chest and esophagus, and, for example, a rash on his face, do not record any complaints of knee difficulty, except for one occasion during March, when quadriceps exercises were recommended (AC-16, pages 1-7, 21-24, 26). When examined by Dr. Field on May 12,1980, because of complaints of back and knee discomfort, no atrophy of the back muscles were found, the LaSegue's sign (for sciatica) was negative, the reflexes, although sluggish, were equal, and there was no disturbance of sensation. Dr. Field's prescription was for weight loss, exercise, and postural training. Other than the scar on the left knee, the examination of that joint was found unremarkable (AC-16, page 31), and when reexamined on June 9, 1980, Dr. Field made no reference to any problems with the claimant's knee (AC-16, page 38).

Call sheets for the period from July thr-

ough November 1980 record a number of complaints about headaches, neck discomfort, upper respiratory infection symptoms, sneezing, hemorrhoids and a rash, as well as the claimant's request to be admitted to the prison yard. However, these records make no reference to knee symptoms (AC-16, pages 8-13). Similarly, medication sheets do not reveal that medications commonly prescribed to alleviate discomfort were prescribed to treat complaints of knee symptoms. (AC-16, page 30, 44-45, 51-52.

The claimant was neurologically examined by Dr.M.H.Chaudry on February 6,1981. At that time, Dr. Chaudry found that the claimant's gait and station were normal, that Romberg's sign was negative, that the sensory system was intact, and that the deep tendon reflexes (DTRs) were bilaterally active and symmetrical (AC-17

page 10). After reexamining the claimant, apparently on April 3, 1981, Dr.Chaudry's findings remained unchanged (AC-17, page 14).

Dr. Field reevaluated the claimant's knee on August 24,1981 and reported that he found no atrophy of his thighs, no instability of the knee joint, and no patellar tenderness. Knee flexion was to 90°, and there was no clinical evidence of any loose body in the joint. He recommended continuation of isometric exercises (AC-17, page 30).

Dr.Thomas J.Capostosta examined the claimant's left knee during July, 1982. At that time the claimant, the claimant who was walking with a cane, was observed not to be in any acute distress. Knee range of motion was normal. Pain was noted at the extremes of flexion and extension, as well as marked crepitus at the patello-

femoral joint. Slight instability was present and the quadriceps muscle was weak on the left. X-ray films were classified as being consistent with "severe" arthritis of the left knee joint.

It was Dr. Capotosta's opinion that the claimant should receive anti-inflammatory medication and that he be allowed to use a cane or crutch to assist with ambulation for the remainder of his prison stay. He observed that, in the future, a total knee replacement might be necessary. However, Dr. Capotosta observed that this procedure should only be undertaken if the pain became so severe that the claimant could not tolerate the discomfort (AC-18, page 32).

Although the claimant last met the special insured status requirements for title II disability benefits on March 31,1979,

the Appeals Council has carefully considered all of the documentary evidence and testimony of record when assessing his physical (i.e., exertional) residual functional capacity as of that date. While the claimant sustained certain injuries in October 1979 when he received a beating (see AC-15, page 6) which later led to complaints about shoulder, back, and neck discomfort, the Council notes that prior to this incident, the record does not show that he had any significant impairment of back, shoulder, neck, arm, hand, hip, or right leg function. The only physical problem limiting the claimant's ability to function consisted of his troubles with his left knee which began when, as a result of another earlier beating, his patella was injured during January 1975 and,apparently, became susceptible to chronic dislocation. However, when examined on June 29,1975 (CT, page

135), the range of motion of the joint was normal, and there was good ligamentous stability. The problem of subluxation was surgically treated (CT, pages 138-139) and it was the opinion of the operating surgeon that the procedure had gone well. When discharged, the claimant's condition was listed as improved and his prognosis good (CT, page 132).

Subsequent to the operation, the medical records, as noted above, document continued healing and return of knee function. By November 1975, Dr. Field found only "some" soft tissue swelling. A "good" range of motion existed. The turgor of the claimant's muscles had improved and there was no extra fluid in the knee (CT, pages 173-174). Although atrophy again was noted by Dr. Field in June 1976, x-rays showed that "substantial" healing had occurred and that a "mod-

erate" degree of osteoarthritis was present (CT, page 179). Hospital reports from 1977, while documenting a wide variety of other complaints, do not indicate that the claimant had complaints about his knee (AC-13, pages 6-7, 19, 20-21), and when reexamined by Dr. Field on October 24, the thigh muscle atrophy had been overcome. Although some "slight" crepitation was present, a comparison of old x-rays with films of October 21 revealed no change in the extent of the arthritis which was classified by Dr. Field at that time as "mild" (AC-13, page 25).

The medical records for 1978 (see AC-14, generally) do not disclose any ongoing treatment of the claimant's knee, and at the hearing before the administrative law judge, the claimant's testimony specifically indicated that, despite his nar-

colepsy (discussed in more detail below), he could have continued to work as a carpenter after November 1974 had he not been in prison, where he sustained the left knee injury which he indicated was the medical reason for his inability to work (CT, pages 49-50). Although Dr. Bell testified that the claimant's knee function was to a certain extent limited, his discomfort was treated with plain aspirin except for those few occasions when flareups occurred which were briefly treated with cortisone medications (CT, pages 65-69).

Call sheets through the close of July 1979 (AC-10, pages 6-7) do not reveal any ongoing significant knee trouble, and when seen by Dr.Field on May 31,1979, only a trade of crepitation was found in the knee which was not tender over the joint surface. Only "some" discomfort

was present at 90° of flexion. There was no instability, and the x-ray showed no significant arthritic change (AC-15, page 1). When hospitalized in October 1979, the claimant was "unwilling" to flex the knee. However, the examining physician observed that, when the claimant was seated, flexion to 90° was possible and that flexion past 90° was done without complaints of pain when he was distracted (AC-15, page 31).

Finally, Dr.Field found nothing remarkable about the claimant's knees on May 12, 1980 (AC-16, page 31) and Dr.Chaudry reported, after examining the claimant twice during 1981, that his gait and station were normal, that his reflexes were bilaterally active and symmetrical, and that his sensory system was intact (AC-17, pages 10, 14).

On the basis of this evidence, it is the

opinion of the Appeals Council that while the claimant's narcolepsy (a non-exertional impairment) would not have affected his ability to perform his usual work as a carpenter, his knee injury and its sequelae would have prevented him (through March 31,1979) from standing and walking for prolonged periods, lifting and carrying objects weighing more than 10 pounds, climbing ladders, operating machine controls with his left leg, and from kneeling. These limitations would have prevented the claimant from performing his usual work as a carpenter.

Although Dr. Capotosta's July 21,1982 report (AC-18, page 32) does document a significantly more limited residual functional capacity as of that date, the Council is of the opinion that his findings cannot be related back to the date on which the claimant was last insured on March 31,1979. The reported medical

findings of Dr. Field and Chaudry through April 1981, as described above, reveal that the function of the claimant's left leg was consistent with the Council's conclusions with respect to his residual functional capacity. Dr. Capotosta's findings, which were made 15 months after Dr. Chaudry's observations about the claimant's gait, station, and neurological functioning, and more than three years after the date on which the claimant last met the title II disability insurance requirements, while revealing a recent and relatively sudden change for the worse in the condition of the claimant's knee, consequently have no bearing on the claimant's residual functional capacity prior to April 1, 1979.

The remaining step in the Secretary's "sequential evaluation" process requires consideration of the claimant's residual

functional capacity, his age, education, and past work experience. If a claimant is able to perform other work, he will not be found to be disabled (section 404. 1520(f)(1)).

Although the claimant's knee impairment would prevent him from doing his regular job as a carpenter, the medical evidence prior to April 1,1979 shows that he had the residual functional capacity from the physical or exertional standpoint to perform sedentary work (as defined in section 404.1567(a)), as well as some light work performed while sitting most of the time, and handling objects weighing very little or operating hand or right foot actuated foot controls (see section 404.1567(b)).

As required by Social Security Ruling 82.58 (SSR 82-58 (Cumulative Edition 1982), pages 120ff.)) the effects of symptoms

such as discomfort on the claimant's residual functional capacity as described above must be considered (page 120, 121-123). However, for the reasons which follow, the Appeals Council is of the opinion that the claimant's knee symptoms would not have significantly affected his capacity to perform work-related functions except for a relatively brief period just prior to and following the June 1975 surgery.

After the injury of the claimant's knee, the medical records of the Camden County Jail show that Norgesic (a pain medication) was prescribed for 7 days and that Fiogesic (a cold remedy with pain-relieving qualities) was prescribed for 5 days. Two months later these medications were renewed (CT, page 129). When admitted to hospital on June 29,1975, the claimant's medications consisted only of amphetamines

for his narcolepsy (CT, page 133). According to the County Jail records, after surgery was performed the Norgesic was renewed (CT, page 129). However, when rehospitalized in July 25,1975, the doctor's order sheets, examination reports, and nursing notes indicate that he had no complaints of knee pain, that his days and nights were spent quietly, and that no prescription medications were dispensed (CT, pages 152-156, 160-162, 164). No prescription pain-relieving medications were given during the remainder of the month, early September or during November 1975. When examined by Dr. Field during the latter part of 1975 there were neither references to any complaints of pain voiced by the claimant, nor did Dr.Field note that motion of the joint produce any discomfort (CT, pages 170,172,173). Doctor's call sheets, the examination reports prepared by Dr. Field, prescription

medication record for 1976 do not record complaints of knee pain or treatment for discomfort (CT, pages 178, 181-182, 188, 189; AC-10, pages 1-2 and AC-12, pages 3-4). The call sheets for 1977, while noting prescriptions for amphetamines, the claimant's request to see a dentist, and, for example, his complaint about a burning sensation in his eye, make no reference to knee discomfort (AC-10, pages 2-4, 28-32). When observed by the nursing staff when hospitalized between September 6,1977 and September 13,1977, the claimant had no complaints at all referable to his knee and was seen to be in "good spirits" (AC-13, page 8). When rehospitalized because of cold symptoms during the period September 30,1977 through October 27,1977, neither prescription pain medications, nor complaints of knee discomfort were recorded by the nursing staff (AC-13, pages 15, 18-21, 22-23).

In 1978, the doctor's call sheets noted complaints as minor as a rectal rash, some pain after a bowel movement, and for example, problems with hemorrhoids and a skin rash. However, these records do not disclose that the claimant complained of knee pain or that any medications were dispensed for this kind of problem (AC-10, pages 4-5; AC-14, pages 3, 10-15). At the May 1978 hearing, the claimant did not testify that his knee problem had been significantly painful and Dr. Bell indicated that plain aspirin ahd been used to treat the claimant's symptoms except for isolated instances of short duration.

Moreover, before the claimant was involved in another incident in October 1979, which produced initially painful injuries, the record shows that he com-

plained of pain only once. Dr. Field's sreport of May 31,1979 recorded the complaint. However, on examination, the joint was not tender and range of motion only "some discomfort" at 90° of flexion (AC-15, page 1). After the October 1979 incident, another physician specifically noted that while the claimant complained of bilateral knee pain and was "unwilling" to flex his knees past 90°, painless flexion beyond that point was done when the claimant was distracted (AC-15, page 31).

As explained in Social Security Ruling 82-56 (SSR 82-56 (Cumulative Edition 1982), page 115)), before it can be determined whether a claimant can perform other work, consideration must be given to the question of whether his residual functional capacity would be further limited by a medically determinable non-exertional impairment. In this case, while

the Council has found that his residual functional capacity prior to April 1, 1979 would not have been adversely affected by subjective symptoms of discomfort, the remaining question is whether that capacity would be diminished by the claimant's awake-sleep disorder.

The medical evidence shows that as early as November 1966 when hospitalized, the claimant complained of a seven-year long history of drowsiness accompanied by brief periods during which he was not aware of his surroundings. These "attacks" occurred, for example, when sitting, standing, driving an automobile. According to the hospital records, the neurological examination was normal (CT, page 114). The electroencephalogram was described as being "grossly abnormal" and narcolepsy with cataplexy was disagnosed (CT, page 116). When discharged, the claimant was

given both Dexedrine tablets and Dexedrine Spansules to be taken on a regular schedule and as needed to treat the drowsiness (CT, page 117).

The Camden County Jail records disclose that when the claimant's medical history was taken on December 4,1974 (CT, page 123), he mentioned that he had "sleeping sickness". However, he was not taking any medication for the problem at that time. After obtaining the claimant's hospital records from 1966, Dexedrine treatment was prescribed on December 26,1974 and the prescriptions were renewed through June 1975 (CT, page 129), as also noted in the June 29, 1975 hospital admission summary (CT, page 133). The Ritalin and Dexedrine were renewed in July and August 1975 (CT, page 151), and according to inpatient hospital records for the period from July 28 through August 20,1975,

these medications were dispensed at the time of day ordered by the attending physician (CT, page 156). While hospitalized and receiving his medications on schedule, with the one exception noted below, the nursing notes disclose that he had no complaints of drowsiness through August 11,1975. On that day, by error, his medications were temporarily discontinued, prompting the claimant to complaint that he was not receiving his prescription (CT, page 155). After the medication was reinstituted, the claimant had no further complaints throughout the rest of his hospital stay (CT, pages 153-154). During the remainder of 1975, Dr. Field examined the claimant on at least three occasions (August 29, September 15, and November 13). However, none of his reports indicate that the claimant was drowsy or that he was not alert during

the examinations (CT, pages 169, 172, 173). According to Dr.Chaudry's report concerning the November 30,1975 electroencephalogram, the claimant was alert and awake during the test which was interpreted as being normal (CT, page 175).

Dr. Field's reports of June 21, July 19, and September 17,1976, noted no symptoms attributable to the narcolepsy (CT, pages 178, 182, 186), and when seen by Dr. Chaudry during 1976 (AC-12, page 1 and CT, page 184), he reported that the claimant was alert, coherent, and oriented. No drowsiness was observed and, while the neurological findings were normal, it was his opinion that the claimant appeared to have narcolepsy. Call sheets for 1976 (AC-10, pages 1-2) show that the claimant's medications were renewed periodically and that although he complained, for example, about cold symptoms, there were

no complaints about drowsiness or falling asleep. Available medication records also show that his prescription was dispensed as prescribed (CT, page 186 and AC-12, page 3-4).

Medical records for 1977 noted only that during the first part of the year, the claimant complained of a toothache, and a burning sensation in his eye (AC-10, pages 1-3). When hospitalized in early September, the nursing staff noted that the claimant had no complaints (AC-13, page 8), and that his medications were dispensed as ordered (AC-13, page 9). During the claimant's hospitalization between September 30,1977 and October 22,1977, medication records show that he received his amphetamines on schedule (AC-13, page 22-23) and that, according to the nursing notes, he voiced no complaints and was, for example, observed to be alert, playing

chess, and on another occasion, reading (AC-13, pages 18-21). Other medication records for 1977 generally show that the claimant's medications were dispensed as prescribed (AC-13, pages 28, 31-32). The records for August 29 through September 3,1977, however, show that the claimant refused to take the Ritalin that had been prescribed (AC-13, page 29). Later in the year, call sheets show that the claimant complained once of being unable to stay awake (AC-10,page 3). A physician's note,however, indicated that if necessary the medication levels would be increased in order to control the problem (AC-13, page 4).

Call sheet entries for the first three months of 1978 disclose no further complaints about being unable to remain awake. And, while the claimant complained to Dr.Bell on April 29,1978 that he

was not receiving his medications on time, the medication reports show that the Dexedrine tablets and Dexedrine Spanuels were dispensed at the hour prescribed between January 1 and April 30,1978 (AC-10, page 4 and AC-14, pages 10-15).

At the hearing held in May 1978, the claimant testified that he had difficulty completing the GED courseowrk because he kept falling asleep and that this problem persisted while attending college course, resulting in failure in these classes. He explained that during this latter period of study he had not been given any medication to keep him awake.(CT, pages 55-57). As long as he was active doing something stimulating, he remained awake. But, if he was not stimulated, then he could fall asleep while standing up, waiting for a bus (CT, page 58). The claimant also testified that the medications helped but

only to the extent that they prevented seizures (CT, page 59). During these seizures, he had often fallen. Because of these phenomena, he always lay down when in his cell (CT, pages 60-61). According to Dr. Bell, the narcolepsy was treated with Dexedrine given on a regular basis and at regular intervals so that the claimant could function. A few weeks earlier (an apparent reference to the complaint voiced to Dr. Bell on April 20,1978), the claimant had been having trouble staying awake during classes. Dr. Bell emphsized that the medications had to be dispensed on time to prevent this from happening (CT, page 64). For the remainder of 1978, the claimant was noted to complain about a rectal rash, some testicular pain, and his hemorrhoids. However, from the record, he had no complaints about trouble staying alert (AC-10, page 5).

Similarly, during the first 10 months of 1979 there is no indication that the claimant's narcolepsy resulted in significant symptomatology. However, the evidence does show that he complained, for example, of a "mild" sheeze and a rash (AC-10, pages 6-8). When hospitalized in October, nursing notes reveal, for example,that the claimant was alert and awake during daylight hours (AC-15, page 9), that he voiced no complaints (AC-15, page 10), that he was observed to be reading while resting in bed (AC-15, page 12), that by October 25,1979 he was out of bed all day, playing chess (AC-15, page 14), that he was watching television (AC-15, page 17). However, during the 20-day long period during which the nurses observed the claimant, recorded his complaints, and generally administered to his needs, there is no reference to any problems caused by the narcolepsy. When rehospitalized for thir-

teen days during late November and early December 1979, the nurses noted that the claimant was watching television while sitting in a wheelchair, that he was conversing with other patients (AC-15, page 35), that he was observed to be awake late in the evening while watching television (AC-15, pages 36,40).

Call sheets show that the claimant was examined by hospital or clinic physicians at least 25 times during 1980 (AC-16, pages 1-13). However, the notes make no reference to any of the narcolepsy symptoms. In early May 1980, Dr. David G.Williams, who had been treating him since October 1977 (see AC-13, page 25) noted that the claimant had been hoarding his medication and ordered a change to liquid amphetamines, which the claimant refused to take (AC-16, pages 32-34).

After examining the claimant twice during early 1981 and after he interpreted an electroencephalogram as being consistent with narcolepsy (AC-17, pages 10, 11, 14), Dr. Chaudry ordered the claimant to be hospitalized on June 8,1981 and gave instructions that he be observed by the nurses every half hour to determine the effects of the narcolepsy (AC-17, page 19). The nurses' records show that on the day of admission no narcoleptic episodes were observed and that the claimant spent the day socializing with other patients and reading a book. No problems were seen the following day and the claimant voiced no complaints. On June 10, it was specifically noted that the claimant was observed at half hour intervals and was seen to be watching television, talking with others while sitting in a chair, and that he was awake and alert during the nursing shift (AC-17, pages 20-21). Again on June 11,

it was noted that the claimant had no problems and that he was awake and alert when observed (AC-17, page 21). The entry for June 12 reveals that during the shift, the claimant was awake and alert, socializing with others, and joking with one other patient in particular. There were "..no visible signs of any narcolepsy episodes." Another nurse observed that he was watching television at intervals and making telephone calls. Except for a short nap about 6 p.m. the nurses indicated that the claimant had no complaints and was awake, alert, and socializing on June 13 (AC-17, page 22). No symptoms were noted on June 14 or June 15, when he was discharged after being reexamined by Dr. Chaudry (AC-17, page 23).

The available prison medical records for 1982 show that while the claimant complained about, but refused treatment for,

other health problems, there were no complaints of symptoms caused by narcolepsy.

Affidavits have been submitted by counsel from an inmate at the Trenton State Prison and one of the claimant's friends dated April 13,1982 and May 3,1982 (Exhibits 21 and 22, respectively). These attest to the fact that the claimant, for example, would fall asleep two or three times during a half hour long conversation, that he slept all day long, and that when standing he would suddenly collapse into a state of sleep (Exhibit 21). A friend of the claimant's stated that he had known the claimant for 20 years and that throughout this period the claimant had "sleeping attacks", even while standing up, sitting, driving a car, or talking (Exhibit 22). An affidavit from a second prisoner at Trenton, dated November 8,1982, states that the claimant had "sleep attacks"

frequently and would fall asleep several times during a twenty minute conversation (Exhibit 24).

At the request of counsel (see AC-22), the administrative law judge arranged to have the claimant's narcolepsy evaluated by Dr. Michael J.Thorpy (a neurologist) pursuant to the Order of the District Court. Dr. Thorpy examined the claimant on October 5,1982 and reported that from the neurological standpoint, no abnormalities were found. After considering the results of a polysomnography study and a multiple sleep latency test, it was Dr. Thorpy's recommendation that analeptic medications should be administered. It was his opinion that the claimant was "severely disabled" at that time and was unable to "..do any type of gainful employment." Dr. Thorpy also observed that medication might improve

the claimant's functional capacity. He added that the underlying condition could not be reversed(Exhibit 25).

In a letter to the administrative law judge dated November 16,1982, Dr. Thorpy emphasized that the testing conducted in October 1982 confirmed the diagnosis of narcolepsy. He indicated that it was not possible to predict the extent to which the claimant's symptoms would be relieved by medication, adding that in his opinion it would be"...virtually impossible to return him to a normal functioning level by the use of any medications" (Exhibit 26). Writing on December 2,1982, Dr. Thorpy indicated that the claimant had been totally disabled since 1966 and that, even when treated, narcolepsy was a "disabling condition" (AC-2, Schedule B).

In addition to the evidence discussed above, the Appeals Council also has considered a "medical analysis" furnished by Dr. Michael W.Dennis, a Board-Certified specialist in neurology dated December 3, 1979 (CT, page 9). It was his opinion that the evidence then of record established that the diagnosis of narcolepsy and cataplexy was correct. However, he observed that these disorders generally responded well to stimulant medications and that narcoleptic attacks could be avoided if the individual was engaging in stimulating activities. Avoidance of these episodes did not require ambulation, but rather stimulating activities which could include reading, desk work, and other interesting pursuits.

The Appeals Council has carefully considered all of the evidence and testimony when determining whether the claimant's

residual functional capacity prior to April 1,1979 was affected by his sleep disorder. Although the Council agrees that the evidence is consistent with the diagnosis as reported by Drs. Chaudry, Dennis, and Thorpy, the Council is of the opinion that the claimant's testimony and the affidavits concerning the manifestations of the disorder (i.e. functionally limiting episodes of drowsiness and sleep) cannot be accepted as credible, and that, consequently, the claimant's remaining capacity for work activity would not have been significantly affected. The claimant has testified as to the frequency of his symptoms of sleep and drowsiness and the affidavits submitted by counsel suggest that these episodes may occur as often as two or three times during a brief conversation lasting twenty or thirty minutes. However, the documentary evidence from late 1974 through

June 1981, with only rare exceptions, not only shows that the claimant did not complain to his attending physicians about these symptoms, but also that when he was asked by medical personnel, he had no complaints. The examining physicians reports over a period of more than five years do not indicate that one of these "attacks" occurred during the course of their examinations. Hospital records covering many periods of inpatient treatment, during which the claimant's behavior was observed by the nursing staff, reveal that the claimant voiced no complaints about the symptoms, and that has been seen to be awake and alert and engaging in such activities as watching television while resting in bed, playing chess, reading while bedresting, and other activities. Moreover, when hospitalized by Dr. Chaudry between June 8, 1981 and June 15,1981 for the spe-

cific purpose of having the claimant closely observed at half hour intervals to determine the effects of narcolepsy, no episodes of drowsiness or "sleep attacks" were seen, and when questioned by the nurses, he had no complaints.

Moreover, Dr. Bell's testimony suggests that the claimant's symptoms could be controlled with proper doses of medication timely administered. The claimant's letter of May 7,1980 indicates that he refused to take the liquid form of Dexedrine because he believed that it would not control the symptoms of the disorder, suggesting that the tablet and Spansuel forms of the drug was effective (AC-16, page 32). Hospital and clinic records show that when the stimulants were dispensed in accordance with standing physicians' orders, the medications were effective. The only significant complaints

voiced by the claimant and reflected in the record and Dr. Bell's testimony were on those rare occasions when the medications were not dispensed on time resulting in temporary periods of symptom exacerbation which abated when corrective action was taken.

In view of the medical evidence of record which discloses that as late as June 1981, the claimant's ability to function was maintained provided that medications were taken as prescribed and that when observed he neither experienced these episodes, nor complained about them, the Council is of the further opinion that Dr. Thorpy's December 1982 conclusion that the claimant has been disabled since 1966 must be rejected because it is not consistent with the evidence furnished by attending physicians and other treating medical sources.

As explained in Social Security Ruling 83-14 (SSR 83-14 (January 1983 Edition) pages 70-77)), in those cases where exertional and non-exertional impairments exist, the "framework" of the "Appendix 2 -- Medical Vocational Guidelines" to Regulations No. 4, Subpart P is applicable. The Introduction to the "Guidelines" notes that when no specific rule found in the tables applies, the rule still provides guidance for decision making in instances where a combination of exertional and non-exertional medical conditions (section 200.00(d), Appendix 2)).

In view of the claimant's residual functional capacity to perform sedentary work as well as some light work performed while seated involving objects weighing very little and the operation of machine or other controls, as well as his age as of March 31,1979 (33 years old which is de-

fined as being a "younger individual" (section 404.1563(b)) education (GED certificate), and prior work experience (semi-skilled to skilled), the "framework" of Rules 201.28 and 201.29 of Table No.1 and of Rules 202.28 and 202.29 of Table No. 2 of Appendix 2 apply herein. In view of the "framework" of these rules, the Council concludes that the claimant was not under a disability at any time on or before March 31,1979. It is also the opinion of the Council that in light of these findings the recommended decision of the administrative law judge cannot be adopted.

FINDINGS

After careful consideration of the entire record, the Appeals Council makes the following specific findings:

1. The claimant filed an application for disability insurance benefits

under title II of the Social Security Act, as amended, on April 20, 1976.

2. The claimant last met the special involved status requirements under title II of the Act on March 31, 1979.

3. The claimant has the following impairments: a left knee disorder and cataplexy and narcolepsy.

4. The claimant's subjective complaints of knee discomfort, drowsiness, and "sleep attacks" are not credible and would have no substantial effect on his residual functional capacity.

5. The claimant, who has not engaged in substantial gainful activity through March 31,1979, has a "severe" impairment of his knee, which when considered in combination with his narcolepsy and cataplexy does not meet or equal

the levels of severity described in any paragraph of Appendix 1, Listing of Impairments to Subpart P.

6. The claimant is unable to perform his prior medium to heavy, semiskilled to skilled work as a carpenter.

7. Considering the claimant's exertional limitations, he has the residual functional capacity to perform sedentary work (as defined in section 404.1567(a)) and light work (as defined in section 404.1567(b)) which requires sitting most of the time, lifting objects weighing very little, as well as some pushing or pulling of controls.

8. The claimant was born on May 20, 1945, and is a "younger individual."

9. The framework of Rules 202.28 and 202.29 of Table No. 1 and 203.28 and 203.29 of Table 2 of "Appen-

dix 2 -- Medical-Vocational Guidelines" to Regulations No.4, Subpart P establishes that the claimant was able to perform other work which exists in the National economy prior to April 1,1979.

10. The claimant was not under a disability at any time on or prior to March 31,1979.

DECISION

The Appeals Council does not adopt the recommended decision. It is the decision of the Appeals Council that, based on his application filed on April 20,1976, the claimant was not under a disability and entitled to disability insurance benefits under the provisions of sections 216(i) and 223, respectively, of the Social Security Act, as amended, on or prior to March 31,1979.

APPEALS COUNCIL
/s/ JOHN W.CHAMBERS
John W.Chambers,Member
/s/ RICHARD F.BRODSKY
Richard F.Brodsky, Member

Date: Feb 13,1984

APPENDIX 6

Department of Health & Human Services
Social
Security Administration
Office of Hearings and Appeals

Name and address of Claimant
Mr. Julius Taylor
1456 North Felton Street
Philadelphia, Penna. 19156

Notice of Recommended Decision of Administrative Law Judge on Court Remand

PLEASE TAKE NOTICE that, pursuant to the Appeals Council's order of remand, dated 3/30/82, there is enclosed herewith the administrative law judge's findings of fact, conclusions of law, and recommended decision.

You are hereby notified of your right to file briefs or other written statements of exceptions and comments as to applicable facts and law. Any such briefs or written statements should be sent within 20 days from the date shown below to the Appeals Council, Attention Division of Civil Actions, Office of Hearings and Appeals, SSA

P.O. Box 2931, Washington, D.C. 20013. Any request for an extension of time will be granted, at the discretion of the Appeals Council, upon a showing of good cause. After the time granted for filing briefs and written statements has expired, the Appeals council will review the record and issue its decision.

This notice and enclosed copy of findings of fact, conclusions of law, and recommended decision, mailed

December 7, 1982

cc:

Name and Address of Representative
Albert Kahn, Jr., Esq.
143 East State Street
Suite 631
P.O. Box 1413
Trenton, New Jersey 08607

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Editions

Department of
Health and Human Services
Social Security Administration
Office of Hearings and Appeals
Recommended
DECISION
Court Remand

In the case of	Claim for
Julius Taylor Claimant	Period of Disability Disability Insurance Benefits
(Wage Earner)(Leave blank same as above)	202-34-2877 (Social Security Number)

STATEMENT OF THE ADMINISTRATIVE PROCEEDINGS

This case is before the undersigned Administrative Law Judge by order of the Appeals Council, dated March 30,1982, following remand to the Secretary of Health and Human Services by the United States District Court for the District of New Jersey, order dated August 4,1981 (Civil Action No. 78-2997). The Appeals Council vacated denial of the claimant's request for review and the prior decision of the Administrative Law Judge and remanded

this case to the undersigned Administrative Law Judge to obtain a consultative neurological examination and to take any other action not inconsistent with the courts order.

ISSUES

The general issue before the administrative law judge is whether the claimant is entitled to a period of disability and to disability insurance benefits under sections 216 (i) and 223, respectively, of the Social Security Act, as amended.

The specific issues are whether the claimant was under a "disability," as defined in the Act; if so, when such "disability" commenced and the duration thereof; and whether the special earnings requirements of the Act are met for the purpose of entitlement.

EVALUATION OF THE EVIDENCE-APPLICABLE REGULATIONS

Section 404.1520 (b) of the regulations

(20CFR 404.1520 (b)) provides that an individual who is working and engaging in substantial gainful activity will not be found to be "disabled" regardless of medical findings. Section 404.1520 (c) (20 CFR 404.1520 (c)) provides that an individual who does not have a "severe impairment" will not be found to be "disabled". Section 404.1520 (d) (20 CFR 404.1520 (d)) provides that if an individual is not working and is suffering from a severe impairment which meets the duration requirement (i.e., has lasted or is expected to last for a continues period of at least 12 months) and which "meets or equals a listed impairment in Appendix 1," a finding of "disabled" will be made without consideration of vocational factors. Section 404.1520(e) (20 CFR 404.1520 (e) provides that if, despite a severe impairment, an individual is capable of performing work he or she has done in the past, a finding

of "not disabled" must be made. Finally, section 404.1520 (f) (20 CFR 404.1520(f)) provides that if an individual's impairment is so severe when considered in conjunction with age, education, and work experience, that he or she may not do his or her past work or any other work, a finding of "disabled" will be made.

EVIDENCE CONSIDERED

The Administrative Law Judge has carefully considered all the documentary evidence described in the List of Exhibits attached to this decision. A remand hearing is deemed unnecessary given the weight of the medical record and the favorable nature of the decision herein.

DISCUSSION AND EVALUATION OF THE EVIDENCE

In the instant case, the claimant initially filed an application under Title II of the Social Security Act for a period of disability on April 20,1976, indicating that he had been born on May 20,1945 in Penn-

sylvania and became unable to work beginning in January 1975 due to "left leg surgery". In a later interview, the claimant also alleged disability due to narcolepsy. This claim was denied initially and upon reconsieration. Being dissatisfied, the claimant requested a hearing which was held on May 18,1978 at the Trenton State Prison. By way of hearing decision dated August 1, 1978, it was determined that claimant did not have any impairment or impairments of disabling severity, as defined under the Social Security Act, as amended. The claimant requested review of the hearing decision on September 5,1978 and the hearing decision was upheld by action of the Appeals Council dated September 28,1978. The claimant's representative thereafter filed an appeal in Federal District Court for the District of New Jersey. As noted above, after additional review of the record, the Federal District Court remanded

the case to the Secretary of Health and Human Services for further consideration, and the Appeals Council remanded the case to the undersigned Administrative Law Judge for appropriate action.

The prior hearing decision dated August 1, 1978 contains a detailed summary of the fact, issues, and law and regulations as were then before the undersigned Administrative Law Judge. As claimant and his representative received a copy of that determination, a restatement of the facts contained therein is deemed unnecessary and the prior hearing decision dated August 1,1978 is incorporated into this decision by reference. Evidence, in addition to that on which the aforementioned decision was based, has been obtained and received into the record. This new evidence, identified as Exhibits 20 through 26, consists of a number of documents, including up-dated consultative neurological reports, which have been set

forth in the List of Exhibits and have been made a part of the record herein.

Current medical evidence includes an intensive neurological evaluation by the Sleep-Wake Disorders Center, with a subsequent report submitted by Dr. Thorpy on October 13,1982. Dr.Thorpy finds evidence of narcolepsy, with claimant's condition being complicated by bilateral knee dislocation. Dr. Thorpy concluded that claimant would be unable to perform any type of gainful employment. It was also noted that claimant's condition was not reversible and "is a life time disorder". (Exhibit 25). In an addendum to his report on November 16,1982, Dr.Thorpy indicated that clinical studies had confirmed the diagnostic impression of narcolepsy and Dr.Thorpy reiterated that claimant was "severely affected by his disease". It was also noted that claimant would not be able to

return to a normal functional level by use of medication (Exhibit 26). Additional evidence submitted since the prior determination includes affidavits from various friends of the claimant,who verify claimant's symptomatology of narcolepsy. It was indicated that claimant falls asleep numerous times during the day, even during activity and during conversations. It was noted that claimant has had similar symptomatology since at least 1974. The Administrative Law Judge concludes that the current record,including the newly received evidence,in combination with the previous record, is now sufficient to show that claimant has been disabled,within the meaning of the Act,due to severe narcolepsy,since date of onset in January,1975. Such disability has continued, uninterrupted, since date of onset, up to and through the date of

the current decision. Sequential evaluation reveals that claimant has had a severe impairment,within the meaning of the Act, since at least January 1974, and that since such time, claimant has been unable to perform his prior work activity, and has been unable to engage in any other relevant work activity. Claimant's period of disability under the Act is therefore based on the authority of section 404.1520(f), of the Act.

However, although the Administrative Law Judge has concluded that claimant has been disabled, within the meaning of the Act, since January 1975, it must be noted that special restrictions and requirements must be met for payment of benefits to inmates of penal institutions.

Section 223(f) (1) Suspension of Benefits for Inmates of Penal Institution

Notwithstanding any other provision of

this title, no monthly benefits shall be paid under this section, or under section 202(d) by reason of being under a disability, to any individual for any month during which such individual is confined in a jail,prison, or other penal institution or correctional facility, pursuant to his conviction of an offense which constituted a felony under applicable law, unless such individual is actively and satisfactorily participating in a rehabilitation program which has been specifically approved for such individual by a court of law and, as determined by the Secretary, is expected to result in such individual being able to engage in substantial gainful activity upon release and within a reasonable time.

(2) Benefits which would be payable to any individual (other than a confined individual to whom benefits are not payable

by reason of paragraph (1) under this title on the basis of the wages and self-employment income of such a confined individual but for the provisions of paragraph (1), shall be payable as though such confined individual were receiving such benefits under this section.

(3) Notwithstanding the provisions of sections 552a of title 5, United States Code, or any other provision of Federal or State law, any agency of the United States Government or of any State (or political subdivision thereof) shall make available to the Secretary, upon written request, the name and social security account number of any individual who is confined in a jail, prison, or other penal institution or correctional facility under the jurisdiction of such agency, pursuant to his conviction of an offense which constituted a felony under applicable law, which the Secretary may require to carry out the provisions of this

subsection.

Upon review of the record, the Administrative Law Judge notes that claimant has been confined in a penal institution for the conviction of a felony during the relevant period herein. During that time, claimant was not involved in a court approved rehabilitation program, specifically and individually approved for such individual, and, therefore, claimant is not entitled to disability benefits under section 223(f)(1) of the Act. Recent evidence indicates that claimant was released from prison on November 15,1982 and a new trial is pending. Therefore, as of November 15,1982, and thereafter, being no longer confined in a penal institution, claimant would be entitled to the benefits awarded above. The Administrative Law Judge also notes that during the period the claimant was confined in a penal institution, sub-

sidiary benefits would have been payable to his wife and children, existing, under section 223(f)(2) of the Act. If such subsidiary beneficiaries existed during such period,they would be entitled to benefits "as though such combined individual were receiving such benefits under this section". And, as noted, claimant himself is entitled to benefits as of his release from prison on November 15,1982.

FINDINGS

After careful consideration of the entire record, the Administrative Law Judge makes the following specific findings based upon the preponderance of the credible evidence:

1. The claimant met the special earnings requirements of the Act in January 1975, the date the claimant stated he became unable to work, and he continued to meet them through at least March 30, 1979.

2. Current review of the record indicates that claimant has been disabled within the meaning of the Act, due to narcolepsy, since date of onset in January 1975, such disability continuing uninterrupted, since onset, up to and through the date of this decision.

3. Such award of benefits is based on the authority of section 404.1520(f), as claimant has a severe impairment, is not able to do his prior work,and is unable to perform any other relevant work-related activity in the national and local economy.

4. As claimant was confined in a penal institution for the conviction of a felony during the relevant period noted herein and (until his recent release on November 15,1982),and as claimant was not engaged in a court approved rehabilitation program

during that period, claimant is not entitled to disability insurance benefits during that period under the authority of section 223(f)(1) of the Act.

5. As of claimant's release from a penal institution on November 15, 1982, and thereafter, claimant is entitled to the receipt of disability benefits which were awarded above.

6. Further, if any subsidiary beneficiary existed during the time when claimant was confined in a penal institution, such as a wife or children, they would be entitled to benefits "as though such confined individual were receiving such benefits under this section". (see section 223(f)(2) of the Act).

RECOMMENDED DECISION

In view of the foregoing, it is the rec-

ommended decision of the Administrative Law Judge that the claimant is entitled to a period of disability and to disability insurance benefits based on his title II application filed on April 20, 1976, under the authority of sections 216(i) and 223, respectively, of the Social Security Act, as amended. Such award of benefits is based on an onset date of January 1975 and is awarded under the authority of section 404.1520(f) of the Act. It is the further decision of the Administrative Law Judge that the claimant is not entitled to receipt of such benefits during the time he was confined in a penal institution under the authority of section 223(f)(1). However, if any subsidiary beneficiaries existed during that time, they would be entitled to an award of benefits under section 223(f)(2) of the Act. The Administrative Law Judge finally notes that as claimant

has been released from prison as of November 15,1982, he would be entitled to disability insurance benefits as of that time and thereafter. However, this decision is preliminary only and is subject to final action by the Appeals Council, adopting, confirming, modifying or rejecting this decision. The claimant will have 20 days from the date of this recommended decision to file with the Appeals Council his exceptions, if any, to the findings, conclusions, and recommended decision of the Administrative Law Judge. The claimant will receive a copy of the Appeals Council decision without further request therefore,and will be advised by the Appeals Council of his rights in connection therewith.

/s/ Irvin N.Hackerman
Administrative Law Judge

Date: 12/7/82

Supreme Court, U.S.
FILED
MAY 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1240

In the Supreme Court of the United States

OCTOBER TERM, 1986

JULIUS TAYLOR, PETITIONER

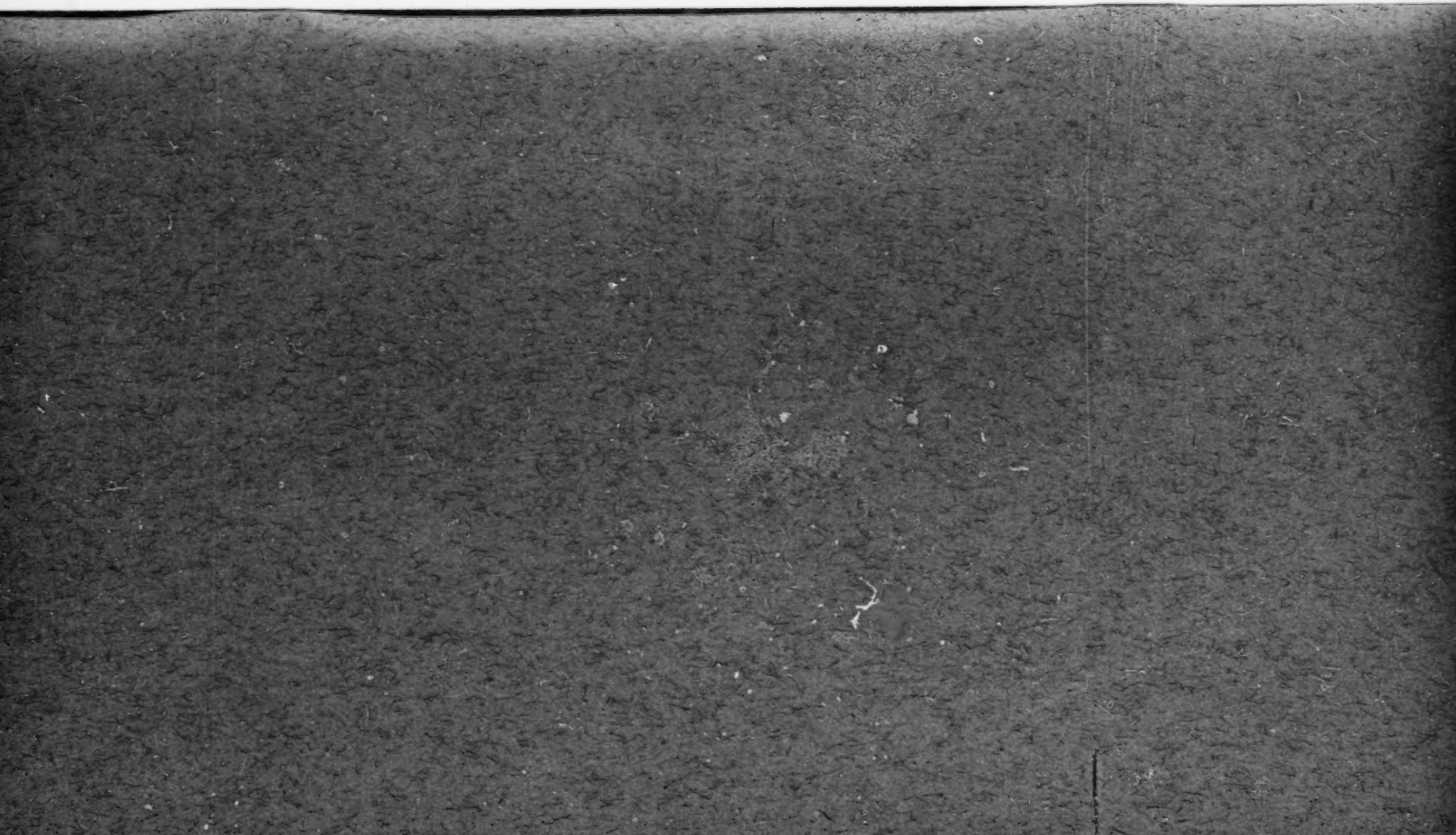
v.

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
RICHARD K. WILLARD
Assistant Attorney General
WILLIAM KANTER
GREGORY C. SISK
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217



QUESTION PRESENTED

Whether the decision of the Secretary of Health and Human Services, which denied petitioner's claim for Social Security disability benefits on the ground that his impairments did not significantly limit his residual functional capacity to perform light or sedentary work, is supported by substantial evidence.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-2) is reported at 787 F.2d 584 (Table). The opinion of the district court (Pet. App. 6-41) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 5, 1986, and a timely petition for rehearing was denied on April 9, 1986 (Pet. App. 3-4).

The petition for a writ of certiorari was filed on June 11, 1986, but was not served on the government until January 29, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner filed an application for Social Security disability benefits on April 20, 1976 (Pet. App. 115-116). He alleged disability since January 1975 due to arthritis in his left knee. In a later interview, he also alleged disability due to narcolepsy, an illness characterized by sudden episodes of drowsiness. Because petitioner's insured status ended on March 31, 1979 (*id.* at 45, 116, 133), he was required to establish disability prior to that date.

On January 20, 1975, while in jail, petitioner suffered an injury to his left knee when he was struck by another inmate (Pet. App. 49-50, 54). He thereafter underwent a surgical repair of the knee (*id.* at 56-57, 64-65). Although medical records reflect that the knee was relatively well healed after the surgery and that its range of motion was substantially restored (*id.* at 63-86), petitioner's physicians observed a mild or moderate arthritis in the joint before March 31, 1979 (*id.* at 69, 71). After petitioner's insured status had expired, a physician treating him in July 1982 concluded that x-rays were consistent with a diagnosis of severe arthritis (*id.* at 80). At that time, anti-inflammatory medication was prescribed and the physician recommended that prison authorities permit petitioner to use a crutch or cane (*ibid.*).

Petitioner had also been diagnosed on several occasions as suffering from narcolepsy. See Pet. App. 94-108. However, the medical records from treating

and attending medical personnel document that, when petitioner was receiving medication on schedule, he failed to complain of drowsiness (*id.* at 96-103). The medical reports also reveal that petitioner never exhibited to medical personnel any symptoms attributable to narcolepsy. The treating medical personnel instead reported that petitioner was always alert, coherent, and oriented (*ibid.*). On only one occasion prior to 1979 do the medical records indicate any complaint by petitioner of an inability to stay awake and alert (*id.* at 99). Indeed, even after petitioner's insured status had expired, when petitioner was hospitalized for observation to determine the effects of the narcolepsy, the medical personnel reported no symptoms of drowsiness, observing that petitioner was consistently awake and alert during daytime hours (*id.* at 104-105, 110-112).

In an effort to counter the absence of complaints or reported symptoms of narcolepsy in the medical records, petitioner submitted affidavits of a fellow inmate and a friend describing incidents in which petitioner fell asleep or became disoriented (Pet. App. 106-107). Petitioner also complained that, while studying for school courses, he frequently fell asleep (*id.* at 100). However, the record indicates that petitioner was not receiving proper medication during this period and that he could remain awake as long as he received medication (*ibid.*).

A medical analysis dated December 3, 1979, which was furnished by a neurology specialist (Dr. Dennis) who had reviewed the medical records, concluded that petitioner's narcolepsy disorder would likely respond well to stimulant medications. Dr. Dennis observed that petitioner's narcoleptic attacks generally could be avoided if he engaged in stimulating activities.

In October 1982, more than three and one-half years after petitioner's insured status ceased, another neurologist (Dr. Thorpy) concluded that petitioner was severely disabled at that time and was unable to perform gainful employment, although Dr. Thorpy stated that medication might improve petitioner's functional capacity. In a subsequent letter, Dr. Thorpy expressed the view that petitioner had been totally disabled since 1966. Pet. App. 107-108.

2. Petitioner's claim for benefits was denied by the Secretary in a final decision rendered on February 28, 1980, and that decision was affirmed by the United States District Court for the District of New Jersey on March 31, 1981 (Pet. App. 7). On August 4, 1981, the district court, on petitioner's motion, vacated its decision and remanded the case to the Secretary with instructions to arrange for a comprehensive neurological examination (*id.* at 7, 43, 125-126). After receiving the report of Dr. Thorpy and affidavits of friends attesting to narcoleptic incidents since 1974, the administrative law judge (ALJ) issued a decision recommending to the Appeals Council that petitioner be awarded benefits (Pet. App. 119-137). The ALJ concluded, with little discussion (*id.* at 127-128), that petitioner had been disabled since January 1975 due to narcolepsy (*id.* at 128, 134).

The Appeals Council, upon an independent review of the record, rejected the ALJ's recommendation and concluded that petitioner was not disabled at any time before the termination of his insured status on March 31, 1979 (Pet. App. 42-118). After exhaustively evaluating the medical evidence (*id.* at 63-85, 94-109), the Appeals Council found that prior to the expiration of his insured status, petitioner suffered no substantial difficulties with respect to his

knee condition and that his narcolepsy did not significantly impair his work-related abilities if it was properly controlled by medication (*id.* at 109-113). In particular, the Appeals Council concluded that petitioner's testimony and the affidavits of friends concerning incidents of drowsiness and sleep prior to March 31, 1979 "cannot be accepted as credible," in light of the contrary documentary evidence compiled during that period (*id.* at 110-111). Thus, the Appeals Council observed that, with rare exceptions, petitioner did not complain of these symptoms even when asked by medical personnel whether he had any complaints; that reports of examining physicians over those five years did not indicate any such "attack"; and that "[h]ospital records covering many periods of in-patient treatment, during which [petitioner's] behavior was observed by the nursing staff," revealed that petitioner "[h]ad been seen to be awake and alert" and engaging in various activities (*ibid.*). Nor were such episodes observed in June 1981, when petitioner was hospitalized "for the specific purpose of having [him] closely observed at half-hour intervals to determine the effects of narcolepsy" (*id.* at 111-112).

Although the Appeals Council concluded on this record that petitioner's impairments would prevent him from returning to his past work as a carpenter (Pet. App. 85-86), it found that the impairments did not significantly affect petitioner's residual functional capacity to perform sedentary or light work available in the national economy (*id.* at 117-118).

3. Petitioner then filed this action for judicial review of the Secretary's decision in the United States District Court for the District of New Jersey. In an unpublished opinion, the district court again af-

firmed the Secretary's decision, finding that it was supported by substantial evidence (Pet. App. 5, 6-41). A panel of the court of appeals unanimously affirmed in a brief order (*id.* at 1-2).

ARGUMENT

The judgment order of the court of appeals, which affirms the fact-bound and unpublished decision of the district court, is of no precedential value and presents no question of law warranting review by this Court. Furthermore, the concurrent finding by the courts below that the Appeals Council's exhaustive decision is supported by substantial evidence is clearly correct. Petitioner's insured status terminated more than eight years ago, and his claim that he was disabled prior to that time has twice been thoroughly considered by the Secretary and the district court. The petition for a writ of certiorari therefore should be denied.

1. Petitioner's principal contention (Pet. 27-51) is that the Secretary misapplied the medical-vocational guidelines, set forth at 20 C.F.R. Pt. 404, Subpt. P, App. 2. Petitioner argues that he was erroneously denied benefits by application of those guidelines, without a finding that he could perform the full range of light and sedentary work despite his nonexertional limitations. This contention is without merit.

The medical-vocational guidelines "consist of a matrix of the four factors identified by Congress—physical ability, age, education, and work experience—and set forth rules that identify whether jobs requiring specific combinations of these factors exist in significant numbers in the national economy." *Heckler* v. *Campbell*, 461 U.S. 458, 461-462 (1983)

(footnotes omitted). This Court has approved the Secretary's use of the guidelines in determining entitlement to disability benefits. *Id.* at 470.

Because only exertional or strength limitations (such as those attributable to the physical impairment of petitioner's knee) are directly factored into the guidelines, the presence of non-exertional limitations (such as petitioner's narcolepsy) requires the decision-maker to determine whether the guidelines accurately describe the claimant's overall abilities. Thus, in determining whether the guidelines are applicable when the claimant has non-exertional limitations as well as an exertional impairment, the regulations require an evaluation of whether the claimant's "work capability is further diminished in terms of any types of jobs that would be contraindicated by the nonexertional limitations." 20 C.F.R. Pt. 404, Subpt. P, App. 2, § 200.00(e)(2).

In this case, the Appeals Council carefully considered the non-exertional conditions alleged by petitioner and made the necessary determination that the guidelines nonetheless could be used as a framework to assist in the disability determination in the circumstances of this case. Specifically, the Appeals Council found that the arthritis in petitioner's knee would limit him to light or sedentary work.[1] It then found that, prior to the termination of his insured status in 1979, neither of petitioner's non-exertional

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[1] In ascertaining petitioner's residual functional capacity, the Appeals Council found that, despite the arthritis in petitioner's left knee, the medical evidence demonstrated his ability to perform sedentary work, as well as light work that entailed handling objects weighing very little or pushing or pulling of controls, provided that he was able to sit most of the time. Pet. App. 88, 117.

conditions, *viz.*, his allegations of pain attributable to the arthritis and his narcolepsy disorder, would have "significantly affected" (Pet. App. 89, 110) his residual functional capacity to perform that light or sedentary work (*id.* at 80-85, 88-93, 93-110). See also *id.* at 116 (petitioner's "subjective complaints of knee discomfort, drowsiness, and 'sleep attacks,' are not credible and would have no substantial effect on his residual functional capacity").[2] Accordingly, the Appeals Council's application of the medical-vocational guidelines as a framework of decision in this case (see *id.* at 88-89, 93-94, 117-118) was fully consistent with applicable regulatory provisions and with the decisions of other courts of appeals upon which petitioner relies (see Pet. 28-36).[3]

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[2] The preamble accompanying the Secretary's initial promulgation of the medical-vocational guidelines stated that "unless the individual possesses physical capacities equal to the strength requirements for most of the jobs in that [range of work], he or she cannot be classified as able to do the pertinent range of work." 43 Fed. Reg. 55349, 55361 (1978). In this case, the Appeals Council's statement that petitioner's ability to perform light or sedentary work was not "significantly affected" by pain in the knee or narcolepsy (Pet. App. 89, 110) was but another way of saying that those non-exertional conditions did not prevent petitioner from performing "most of the jobs" in the light and sedentary ranges of work (43 Fed. Reg. 55361 (1978)).

[3] In urging the Court to grant review, petitioner seizes upon a typographical error in the Appeals Council's decision. Petitioner contends that the Appeals Council erred in "citing rules 202.28 and 202.29 of Table 2 [of the guidelines] since no such rules exist" (Pet. 35 (emphasis added)). Although the Appeals Council did mis-cite the applicable rules at one point in its decision (Pet. App. 115), in its findings at the end of the opinion, the Council correctly relied upon rules 203.28 and 203.29 of Table 2 (*id.* at 117-118).

Apparently recognizing the weakness of his argument that the Secretary failed to apply the proper legal standard, petitioner argues (Pet. 35-51) that application of the medical-vocational guidelines was inappropriate on the facts of this particular case because his non-exertional limitations were, in his view, "extremely serious" (*id.* at 36-37). However, the Appeals Council reasonably determined otherwise, based upon its independent and thorough evaluation of the evidence. Petitioner thus is simply asking this Court to re-evaluate the factual findings made by the Secretary and accepted by both courts below as supported by substantial evidence (Pet. App. 1-2, 37-41). That issue does not warrant review by this Court.

2. Petitioner's contention (Pet. 51-53) that the Secretary failed adequately to consider the cumulative effects of his multiple impairments is equally unfounded. The Appeals Council's comprehensive opinion demonstrates that it carefully evaluated *all* of the effects of petitioner's arthritic condition as well as his narcolepsy disorder. Thus, after finding that petitioner's knee problem would affect his ability to perform some work-related functions, the Appeals Council stated that "the combined effect of this condition as well as the narcolepsy and cataplexy [loss of muscle control] must be considered" (Pet. App. 58). The Appeals Council then considered the impact of petitioner's narcolepsy and determined that it would not have further restricted his residual functional capacity to any substantial degree (*id.* at 110).

In any event, since the February 13, 1984 date of the Appeals Council's decision (Pet. App. 118), Congress has expressly directed the Secretary to consider

the combined effect of multiple impairments. See 42 U.S.C. (Supp. III) 423(d)(2)(C) and 1382c(a)(3)(G). Congress further specified that this requirement would apply to disability determinations made after December 1, 1984. Social Security Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, § 4(c), 98 Stat. 1801. Any questions concerning the consideration of the combined effect of multiple impairments prior to that date therefore is of no continuing importance.

3. Petitioner next contends (Pet. 53-55) that the Secretary improperly disregarded his subjective complaints of pain stemming from the arthritis in his knee. To the contrary, however, the Appeals Council carefully considered all evidence in the record that might shed light on the degree of pain (Pet. App. 88-93).

Petitioner did not specifically testify at the ALJ hearing in 1978 regarding pain in his knee, although he did attribute his disability to the knee problem (Pet. App. 72-73). In any event, the medical evidence exhaustively reviewed by the Appeals Council revealed that his knee had recovered satisfactorily after surgery (see *id.* at 63-80); that petitioner expressed no complaints about pain in his knee during his recovery or at any time prior to the expiration of his insured status in 1979 (*id.* at 66-67, 70-71, 74-78); and that he was never prescribed any medication (other than plain aspirin) for arthritic discomfort during this period (*id.* at 71-72, 78), except on a few occasions of brief flare-ups (*id.* at 73).

To be sure, more than three years *after* petitioner's insured status had ended, he was diagnosed as suffering from severe arthritis in the left knee joint, and anti-inflammatory medication was then pre-

scribed (*id.* at 80-81). However, based on its review of the medical evidence—and particularly in light of examinations in 1980 and 1981 that revealed no significant knee problems (*id.* at 77-79, 84-86)—the Appeals Council observed that these subsequent developments in 1982 indicated "a recent and relatively sudden change for the worse in the condition of [petitioner's] knee" (*id.* at 87). The Appeals Council therefore made an express finding that, as of March 31, 1979, petitioner did not suffer pain that significantly affected his capacity to perform work-related activities (*id.* at 89). Thus, the Appeals Council in no way "disregarded" petitioner's allegations of pain; it simply declined to credit those allegations, after considering the substantial evidence to the contrary.

4.a. Petitioner also argues (Pet. 55-59) that the Secretary failed to give sufficient weight to the opinion of Dr. Thorpy, the physician who examined petitioner in October 1982. In petitioner's view, the Appeals Council's decision is inconsistent in this respect with appellate decisions holding that the opinion of a treating physician is binding unless contradicted by substantial evidence. This argument, too, is without merit.

It is, of course, true that a treating physician who has maintained a long-term physician-patient relationship with a claimant is often the best source of medical information about the claimant's impairments. For this reason, the Secretary ordinarily gives special weight to the opinions and findings of the claimant's treating physician with respect to medical issues concerning the nature and severity of impairments—although, as petitioner concedes (Pet. 56-57), the physician's medical opinion is not

binding upon the Secretary where contradicted by other substantial evidence in the record, and the resolution of conflicts in the evidence is committed to the Secretary. See also *Schisler* v. *Heckler*, 787 F.2d 76, 81-82 (2d Cir. 1986); *Stieberger* v. *Bowen*, 801 F.2d 29, 31-32 (2d Cir. 1986). This case, however, does not present the issue of the weight to be given the claimant's treating physician, because Dr. Thorpy was not petitioner's "treating physician" and he had no long-term relationship or familiarity with petitioner. Rather, Dr. Thorpy merely conducted an examination of petitioner following the remand from the district court, just as any consultative physician retained by the Secretary or a state agency might do. Compare *Richardson* v. *Perales*, 402 U.S. 389, 402-403 (1971).[4] Moreover, as explained below (see page 13-14, *infra*), Dr. Thorpy's opinion was contradicted by substantial evidence in the record that more directly related to the period during which petitioner was in insured status.

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[4] Moreover, the courts of appeals are in agreement that a treating physician's opinion on the ultimate legal question of disability is not binding upon the Secretary. See, *e.g.*, *Garner* v. *Heckler*, 745 F.2d 383, 391 (6th Cir. 1984); *King* v. *Heckler*, 742 F.2d 968, 973 (6th Cir. 1984); *Wilson* v. *Heckler*, 734 F.2d 513, 518 (11th Cir. 1984); *Barajas* v. *Heckler*, 738 F.2d 641, 645 (5th Cir. 1984); *Carry* v. *Heckler*, 750 F.2d 479 (5th Cir. 1985); *Warncke* v. *Harris*, 619 F.2d 412, 417 (5th Cir. 1980); *Janka* v. *Secretary of HEW*, 589 F.2d 365, 369 (8th Cir. 1978). Accordingly, the Secretary was not required to defer to the conclusory opinion of one physician, Dr. Thorpy, who examined petitioner on one occasion in 1982, that petitioner had been "severely disabled" since 1966 (Pet. App. 107). The decision on that ultimate legal question was reserved exclusively to the Secretary.

b. In a related vein, petitioner objects (Pet. 55-56) to the Appeals Council's reliance (Pet. App. 112-113) on the views of Dr. Dennis, the neurology specialist who reviewed petitioner's medical records in 1979. Petitioner insists that Dr. Thorpy's views were entitled to more weight than those of Dr. Dennis. However, whether or not a non-examining physician's opinion, standing alone, may be relied upon to overcome the extra weight ordinarily given to the views of a treating physician (a status, we reiterate, that Dr. Thorpy did not enjoy), it is clear that a non-examining physician's opinion may constitute substantial evidence where it is consistent with the findings of other medical personnel who *have* personally examined the claimant. See, *e.g.*, *Rodriguez* v. *Secretary of Health & Human Services*, 647 F.2d 218, 224 (1st Cir. 1981). In this case, although Dr. Dennis did not personally examine petitioner, he reviewed the medical evidence provided by petitioner's treating and examining physicians and accepted their diagnosis of narcolepsy (Pet. App. 109). Based upon his medical expertise, however, Dr. Dennis concluded that narcolepsy generally responds well to stimulant medications and that narcoleptic attacks can be avoided if the individual engages in stimulating activities (*ibid.*). This opinion was fully consistent with the reports of treating and attending medical personnel, who documented that petitioner failed to exhibit any narcolpetic symptoms while under their observation (*id.* at 96-105, 109-113). The Appeals Council was unquestionably entitled to credit this direct evidence of petitioner's actual behavior.

In addition, in contrast to most of the direct evidence upon which Dr. Dennis and the Appeals Council relied, which was actually gathered during the

period when petitioner was still in insured status, Dr. Thorpy did not evaluate petitioner and render his opinion until more than 3½ years after petitioner's insured status had terminated. Particularly in these circumstances, petitioner is wrong in asserting that the Secretary was required to give controlling weight to Dr. Thorpy's opinion regarding petitioner's condition prior to March 31, 1979. In the end, it is the province of the Secretary to weigh the evidence and resolve any material conflicts. *Richardson* v. *Perales*, 402 U.S. at 399. Here, the Appeals Council's determination that petitioner's narcolepsy could be adequately controlled and did not significantly affect his ability to perform light or sedentary work prior to March 31, 1979, was amply supported by evidence in the record.

c. In any event, the various issues regarding the relative weight to be given the opinions of treating, examining and non-examining physicians do not warrant review at this time. In Section 9 of the Social Security Disability Benefits Reform Act of 1984 (98 Stat. 1804), Congress added a new subsection (j) to Section 221 of the Social Security Act (42 U.S.C. (Supp. III) 421(j)), which directed the Secretary to issue regulations governing the circumstances in which a consultative examination will be obtained in connection with a disability determination. The Secretary published proposed regulations on that subject on April 20, 1987 (see 52 Fed. Reg. 13014). In the preamble to those regulations, the Secretary noted that the Senate Report on the 1984 Act stated that Congress did not intend the enactment of Section 9 to alter the relative weight that the Secretary places on the opinions of treating and consulting physicians. *Id.* at 13016 (citing S. Rep. 98-466, 98th Cong., 2d

Sess. 26 (1984)). Accordingly, in order to clarify existing policy, and in response to certain court of appeals decisions, the Secretary proposed revisions in 20 C.F.R. 404.1527 and 416.927 "to clearly indicate those instances when a treating source opinion will be conclusive, when it will be given preference, and when neither conclusiveness nor preference will be granted." 52 Fed. Reg. 13016 (1987) (see *id.* at 13022, 13030). These new regulations, when published in final form, should serve to resolve any lingering uncertainty regarding the Secretary's approach in this area. Especially in view of this pending regulatory action, there is no occasion for the Court to consider the "treating physician" issue.

5. Petitioner contends (Pet. 59-61) that the Secretary failed to comply with his own regulations that require the decision-maker to secure the medical judgment of a designated physician with respect to whether petitioner's impairments met or were medically equivalent to a listed impairment. Petitioner is simply mistaken.

Under 20 C.F.R. 404.1520(d), a claimant will be regarded as disabled, without the need to consider his age, education, and work experience, if his specific impairment or combination of impairments meets or is medically equivalent to any one of the listed impairments described by the Secretary in 20 C.F.R. Pt. 404, Subpt. P, App. 1. In express reliance on 20 C.F.R. 404.1526, the Appeals Council considered the opinion of a designated physician on this question (Pet. App. 59). After considering that opinion and all other medical evidence, the Appeals Council concluded that "[petitioner's] impairments, either singly or in combination, are not of the level of severity contemplated by any paragraph appearing in the

'Listing of Impairments' " (*id.* at 59-60; see also *id.* at 116-117).

6. Finally, petitioner objects (Pet. 61-63) to the Secretary's classification of him as an individual with a high school education for purposes of applying the medical-vocational guidelines. However, petitioner concedes (Pet. 62) that he passed his high school equivalency test while in prison. His complaints that he had difficulties in studying for this test and failed it twice before finally passing are irrelevant. The fact remains that he ultimately did succeed. Accordingly, the Secretary properly accounted for his high school level of education in applying the guidelines.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

WILLIAM KANTER
GREGORY C. SISK
Attorneys

MAY 1987

☆ U. S. GOVERNMENT PRINTING OFFICE: 1987 181483 40349